In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
a Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the Estate of
JAMES D. KROGER, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

INDEX—Continued

CASES CITED

CASES CITED—Continued

TEXTS CITED

CONSTITUTION CITED

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The Petitioner, Owen Equipment and Erection Company, a Nebraska corporation, prays that a Writ of Certiorari issue to review the opinion and judgment of the Eighth Circuit Court of Appeals rendered in these proceedings on August 16, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported appears at Appendix A, infra, App. pp. 1-36. The Order denying Petition for Rehearing en banc by an evenly divided court is unreported and appears at Appendix B, infra, App. p. 37.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed June 21, 1977. See Appendix A, App. pp. 1-36, infra. Subsequent thereto a Petition for Rehearing, Motion to Expunge Portions of Opinion and Suggestion for Rehearing in Banc was timely filed on the 16th day of August, 1977. The Petition for Rehearing in Banc was denied *by an evenly divided court* (Appendix B). This Petition for Certiorari was filed less than ninety days from the date of the overruling of said Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Kroger, Respondent, alleged the amount in controversy exceeded $10,000.00. The trial court, however, never acquired subject matter jurisdiction of this action. The alleged basis of jurisdiction was diversity of citizenship. However, the Respondent and Owen Equipment and Erection Company, Petitioner, were both citizens of Iowa at the time of the filing of the complaint.

QUESTIONS PRESENTED

Geraldine Kroger, Administratrix of the Estate of James D. Kroger, Deceased, brought an action for damages for the wrongful death of Respondent's decedent. The action was originally brought against the Omaha Public Power District and Paxton-Vierling Steel Company. The

Omaha Public Power District then filed a third party complaint against the Petitioner. The Respondent then brought an amended third party complaint naming the Petitioner as a defendant.

Paxton-Vierling Steel Company and the Omaha Public Power District were both dismissed out of the suit leaving as party plaintiff, Geraldine Kroger an Iowa citizen and as party defendant, Owen Equipment and Erection Company, a Nebraska corporation having its principal place of business in Carter Lake, Iowa, therefore being a citizen of Iowa.

The petitioner then filed a Motion to Dismiss or in the Alternative for Directed Verdict claiming that the Court did not have jurisdiction of the subject matter of the action. But the trial court overruled the Motion to Dismiss claiming the Court acquired power to hear the whole matter under *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966). The United States Court of Appeals for the Eighth Circuit affirmed that judgment. The questions thereby arising are:

1. Whether the Trial Court acquired power to decide the claim of the respondent against Petitioner.

2. Whether the Trial Court could exercise its discretion to create jurisdiction where none, in fact, existed.

3. Whether the United States Court of Appeals for the Eighth Circuit erred in making findings of fact that Petitioner intentionally concealed its principal place of business without giving Petitioner and its counsel a hearing on that issue in violation of the Fifth Amendment of the United States Constitution.

4. Whether the Trial Court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for that plaintiff to assert a claim against the third-party defendant.

5. Whether the Trial Court erred in finding that jurisdiction existed between Respondent and Petitioner (citizens of the same state) in Federal Court where no federal question was presented and the main cause of action between Respondent and the defendant Omaha Public Power District (citizens of different states) had been dismissed prior to trial at request of defendant Omaha Public Power District.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C. § 1332(a):

§ 1332. *Diversity of citizenship; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Fed. R. Civ. P. 8(b):

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each

claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Fed. R. Civ. P. 12(h)(3):

(3) Whenever it appears by suggestion of the parties or othewise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Fed. R. Civ. P. 14:

(a) *When Defendant may Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party com-

plaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

Fifth Amendment to the United States Constitution:

> No peson shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

Respondent's decedent, James D. Kroger, was an employee of Paxton & Vierling Steel (C. A. Appendix II, pp. 16, 17).* On the 18th day of January, 1972 at the request of a supervisor employed by Paxton & Vierling Steel, respondent's decedent assisted other Paxton & Vierling employees in moving a large steel air tank (C. A. Appendix II, p. 16). The steel air tank was obstructing construction activity at a construction site within the Paxton & Vierling Building (C. A. Appendix II, p. 179).

Lloyd Feller, an executive vice-president of operations of Paxton & Vierling Steel, gave the original order to move the steel air tank (C. A. Appendix II, p. 179). That order was passed down to Mr. Clem Rosemaric, respondent's decedent's immediate supervisor (C. A. Appendix II, pp. 179, 180).

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*Reference is to Appendices used on appeal before United States Court of Appeals for the 8th Circuit.

A large Lorraine crane was being used to move the tank. The crane was mounted on a truck which could move about inside the Paxton & Vierling Building (C. A. Appendix II, p. 3).

A steel cable ran from the boom of the crane to the chains which were wrapped around the air tank (C. A. Appendix II, p. 19). Respondent's decedent was standing on the ground next to the steel tank assisting in steadying the tank as the crane moved from the construction site to the west end of the building (C. A. Appendix II, p. 20). When the crane reached the west end of the building and could go no further, the boom was raised so that the tank could be lowered (C. A. Appendix II, pp. 20, 21). Respondent's decedent was still standing near the air tank (C. A. Appendix II, p. 23). As the boom of the crane was lifted, it came in close proximity to overhead power lines and an arc of electrical current jumped from the air tank into the body of respondent's decedent, causing his death by electrocution (C. A. Appendix II, p. 9).

On the 24th day of November, 1972, respondent filed her complaint in the United States District Court for the District of Nebraska, claiming damages sustained as a result of the wrongful death of James D. Kroger (C. A. Appendix I, p. 4). The action was brought against Omaha Public Power District and Paxton & Vierling Steel Company (C. A. Appendix I, p. 4). Both Paxton & Vierling Steel and Omaha Public Power District filed motions to dismiss (C. A. Appendix I, pp. 12, 18). Paxton & Vierling Steel Company was dismissed out because of a jurisdictional defect. Omaha Public Power District then brought a third-party complaint against Paxton & Vierling

Steel Company and Owen Construction Company, Inc. claiming that both said third-party defendants were liable to the Omaha Public Power Company for any sums which respondent would recover from OPPD on her complaint (C. A. Appendix I, p. 7).

The third-party plaintiff was then granted permission to file an amended third-party complaint naming Owen Equipment and Erection Company, a Nebraska corporation, as an additional third-party defendant and dismissing Owen Construction Company, Inc., an Iowa corporation, from the third-party complaint (C. A. Appendix I, pp. 13, 14).

A motion to dismiss was then filed on behalf of Paxton & Vierling Steel Company claiming that the complaint failed to state a claim upon which relief could be granted (C. A. Appendix I, p. 18). Owen Equipment and Erection Company filed its answer (C. A. Appendix I, p. 19). Respondent was then granted leave to file amended pleadings adding Owen Equipment and Erection Company as a party defendant (C. A. Appendix I, p. 23). The amended complaint was then filed on November 9, 1973, naming Owen Equipment and Erection Company as a party defendant (C. A. Appendix I, p. 23). Owen Equipment and Erection Company then filed its answer to the plaintiff's amended complaint (C. A. Appendix I, p. 31). The trial court then granted Omaha Public Power District's motion for summary judgment and dismissed it from the lawsuit (C. A. Appendix I, p. 39). The United States Court of Appeals for the Eighth Circuit sustained that order of the trial court (C. A. Appendix I, p. 42).

Petitioner also filed a motion for summary judgment (C. A. Appendix I, p. 40). However, that motion was subsequently overruled. Petitioner then filed an additional answer to the plaintiff's amended complaint alleging that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action (C. A. Appendix I, pp. 53, 54).

The basis for Petitioner's claim that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action was that since the Respondent and the Petitioner were both citizens of the State of Iowa there was no diversity of citizenship and thus no independent basis of jurisdiction. Petitioner claimed that before a plaintiff could assert a claim against a third-party defendant in the same action an independent basis of federal jurisdiction was required.

Trial of this matter commenced on the 13th day of January, 1976 (C. A. Appendix I, p. 51).

The jury returned a verdict in favor of the respondent and against petitioner for $234,756.00 and that verdict was reduced to judgment by the Clerk of the Court (C. A. Appendix I, p. 84). The Court filed its memorandum and order overruling petitioner's motion to dismiss for lack of subject matter jurisdiction (C. A. Appendix I, p. 87).

The trial court conceded in that memorandum (C. A. Appendix I, p. 85) that:

> "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defendant is incorporated in the State of Nebraska and has

> its principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. *Hence, an independent basis of jurisdiction does not exist.*" (C. A. Appendix I, pp. 85, 86). (Emphasis added.)

The trial court, however, went on to hold as follows:

> "The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. *See Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.
>
> Properly read, *United Mine Workers* [*v. Gibbs*, 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27 [1], 14-569 to 14-570.
>
> This case is nevertheless novel, in that the third party plaintiff was dismissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this 'pendant' claim.[1] Defendant waited until trial to pre-

1 The Court is aware that "pendent jurisdiction" refers to state claims joined with federal claims and uses the term here in its ordinary context.

sent its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction."

(C. A., Appendix I, p. 86.)

Petitioner filed its motion for judgment notwithstanding the verdict (C. A., Appendix I, p. 87) and motion for new trial (C. A., Appendix I, p. 88), both of which were denied by order of the Court (C. A., Appendix I, p. 124). Petitioner then filed its notice of appeal, perfecting its appeal to the United States Court of Appeals for the Eighth Circuit (C. A., Appendix I, p. 125).

Among the issues presented on review to the United States Court of Appeals for the Eighth Circuit were:

1. Whether the trial court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for the plaintiff to assert a claim against that third-party defendant?

2. Whether the trial court erred in finding that jurisdiction existed between respondent and petitioner (citizens of the same state) in federal court where no federal questions were presented and the main cause of action between respondent and the defendant OPPD (citizens of

different states) had been dismissed prior to trial at defendant OPPD's request.

The Appellate Court found:

". . . In the case before us, the District Court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. Defendant Owen attacks the applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered." (Appendix A, App. p. 21).

The Court went on to hold:

"But beyond that, however, there are other considerations. By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.

"But plaintiff overlooks the application of the *Gibbs* doctrine to ancillary the litigation. The District Court had judicial *power* over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused or not in its retention of the cause, defendant's conduct estops it from asserting abusive discretion, not only that under the teachings of Murphy v. Kodz, supra, but also under the most elementary considerations of judicial fairness. 'Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the fil-

ing of the amended complaint. No reason for the delay has been offered. . . .'

The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct." (Appendix A, App. p. 22).

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with the decision of the Fourth Circuit Court of Appeals in the case of Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc., 512 F. 2d 890 (4th Cir. 1972).

There is no dispute that had the respondent originally sued Owen Equipment & Erection Company, Inc., there would be no diversity of citizenship and thus, no jurisdiction. However, the trial court held that under "the law in Nebraska", a plaintiff may assert a claim against the third-party defendant without an independent basis of jurisdiction. As authority for its holding, the trial court cited cases of *Union Bank & Trust Co. v. St. Paul Fire & Marine Insurance Co.*, 38 F. R. D. 46 (D. Neb., 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb., 1965); and *United Mine Workers of America v. Gibbs*, 383 U. S. 715 (1966).

The first case cited hereinabove does not serve as authority for the Trial Court's holding, for in that case, a claim was made by a third-party defendant against the plaintiff and it was decided that no independent jurisdictional base was required. This is, of course, substantially different than the instant matter where a plaintiff is making a claim against the third-party defendant. This distinction was pointed out in the case of *Rivera Copper & Brass v. Aetna Casualty Co.*, 426 F. 2d 709, 12 A. L. R. Fed. 389 (5th Cir., 1970). Therein, the Fifth Circuit Court of Appeals stated:

> "A cursory review of the joinder situations to which ancillary jurisdiction is applied reveals that generally, it is made available to litigants in a defensive posture, who would otherwise be prevented or greatly burdened in adequately protecting their interests. There is much to be said for allowing parties who are involuntarily brought into federal court to defendant against a claim or who must be allowed to intervene in a federal action as a defendant to secure their interests, to assert all their claims arising out of the controversy in one proceeding and as this is, or ought to be, one of the factors to be considered in determining the existence of ancillary jurisdiction. . . .
>
> "Echoing Professor Moore, Revere argues that since there must be an independent ground of jurisdiction to support the original plaintiff's claim against a third-party defendant, the same requirement must be met by the third-party defendant in asserting a counterclaim against the original plaintiff. *Suffice it to say that the two situations are the converse of each other only superficially and that there are differences which militate against identical treatment. First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can under the rules that forum provides, or defending himself not at all.* Since the plaintiff could not initially join a non-diverse defendant, it is arguable he should not be allowed to do so indirectly by way of a fortuitous impleader. Moreover, there is possibility, whether real or fanciful, or

collusion between the plaintiff and an overly cooperative defendant impleading just the right third party." (Emphasis added.)

The differences are obvious. The Respondent here selected the forum, Petitioner did not.

The trial court cited as further authority for its holding that the law in Nebraska is that an independent basis of jurisdiction need not exist in order for the plaintiff to assert a claim against the third-party defendant the case of *Olson v. United States,* supra. In that case, Judge Van Pelt chose to follow the minority rule and hold that an independent basis of jurisdiction need not exist before a plaintiff can assert a claim against a third-party defendant. It must be emphasized, however, that this minority stand has been taken by a very limited number of courts that have addressed the issue. Other cases which have commented on *Olson* have never followed this decision, but have only criticized it.

In *Kenrose Manufacturing Co. v. Fred Whitaker Co.,* 53 F. R. D. 491 (1971), the United States District Court for the Western District of Virginia stated:

> "On the other hand, there are a few cases which would not require the plaintiff to have an independent basis of jurisdiction in order to amend his complaint to include a third-party defendant with the same citizenship. *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. Neb. 1965). These cases regard a plaintiff's claim against a third-party defendant as ancillary to the original action. In *Buresch,* supra, Judge Gourley, Chief Judge of the Western District of Pennsylvania, felt that to deny ancillary jurisdiction in a case similar to the one at bar would defeat the purpose of avoiding multiplicity of suits and

piecemeal litigation. In *Olson,* supra, Judge Van Pelt of the District Court of Nebraska stated that the fact that there may be collusion in some cases should not prevent plaintiffs from asserting their complaints against the third-party defendants in all cases. This minority view favoring expansion of ancillary jurisdiction to cover the situation at bar also has apparent support from some legal writers. See 6 Wright & Miller, Federal Practice and Procedure § 1444, p. 232 (1971); *Fraser,* supra, 33 F. R. D. at 41-43; *Holtzoff,* supra, 31 F. R. D. at 110.

> "It should be noted, however, that there is still much disagreement on this point. For example, the *Buresch* decision originated from the Western District of Pennsylvania in 1968. Subsequent to that date two cases decided in that same district have rejected the view that no independent basis of jurisdiction is required. *Schwab v. Erie Lackawanna Railroad,* 303 F. Supp. 1398 (W. D. Pa., 1969); *Ayoub v. Helm's Express, Inc.,* 300 F. Supp. 473 (W. D. Pa. 1969) (Judge Weber, District Judge, Decided Both Cases)."

The *Kenrose Manufacturing Co. case* was appealed to the Court of Appeals for the Fourth Circuit. That appeal appears at 512 F. 2d 890 (4th Cir. 1972). That Court cited four cases as following the minority view. Those cases were: *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. C. Neb., 1965); *Myer v. Lyford,* 2 F. R. D. 507 (M. D. Pa., 1942); and *Skylar v. Hays,* 1 F. R. D. 594 (E. D. Pa., 1941). In discussing those cases that Court stated:

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks to

avoid is available without question in the state courts. The majority view, as outlined above, has its own valid supporting reasons and we fail to discern any movement away from the well-established rule, which is directly contrary to appellant's contention.

"It is true that four lower court cases have favored appellant's view. However, not only are these in the minority among the decided cases, but they have been far from convincing to other judges in the very jurisdictions where they were rendered."

In a footnote discussing how other judges have rejected the minority view, the Court stated:

"For example, subsequent to the *Buresch* case, cited in note 9, two decisions issuing from the same court specifically rejected *Buresch*. See *Schwab v. Erie Lackawanna R. R.*, 303 F. Supp. 1398 (W. D. Pa. 1969), and *Ayoub v. Helm's Express, Inc.*, 300 F. Supp. 473 (W. D. Pa. 1969). In *Ayoub*, the Court said:

"'There is no diversity of citizenship between the plaintiff and the present third-party defendant against whom plaintiff wishes to assert a direct claim. The great weight of authority requires that there be diversity of citizenship between such parties. Although such a claim was allowed to be asserted in *Buresch* • • • I do not believe that this opinion represents the view of a majority of the members of this District Court or the view of the majority of the federal courts.'"

In the case of *Palumbo v. Western Maryland Railway Company*, 271 F. Supp. 361 (1967), Chief Judge Thomsen of the United States District Court for the District of Maryland, commented on Judge Van Pelt's holding in *Olson v. United States* in light of the comments of the Advisory Committee on the Federal Rules of Civil Procedure and existing case law. Judge Thomsen stated:

"When Rule 14 was first adopted, Professor Moore expressed the opinion that independent grounds of jurisdiction would be required to support a plaintiff's claim against a third-party defendant, and most of the courts have taken that view. See 3A Moore's Federal Practice, 2d ed., p. 24.27 (I) and cases cited therein. In Friend v. Middle Atlantic Transp. Co., 153 F. 2d 778 (2d Cir. 1946), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 1635, Judge Clark, speaking for the Second Circuit (as well as out of his experience as Chairman of the Advisory Committee on Rules) said:

"'May a defendant cause a third party to be brought into a federal civil action under Federal Rules of Civil Procedure, Rule 14, 28 U. S. C. A. following section 723c, to answer, along with it, to the plaintiff's claim, where the plaintiff and such party are citizens of the same state and federal jurisdiction does not otherwise appear? That is the issue squarely presented here, and we think it must be answered in the negative. Notwithstanding the undoubted convenience of extensive joinder in cases such as this, we must observe the established boundaries of federal jurisdiction, which the rules do not enlarge. F. R. 82.' 153 F. 2d at 779.

"When Rule 14 was amended in 1948, the Advisory Committee noted that 'in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. The note referred to a number of cases and commentators. Since the amendment, the weight of authority has continued to require independent grounds of jurisdiction for such a claim. Moore, op. cit., p. 14.17 (1).

"Judge Van Pelt assembled all the arguments to the contrary in his opinion in Olson v. United States, 38 F. R. D. 489, 490 (D. Neb. 1965), and refuses to follow the majority view. He noted that some courts have expressed 'the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of a third-party practice.' Fear of collusion is not the principal argument supporting the majority rule. Wherever the law provides for contribution among joint tortfeasors, or a defendant has a possible claim for indemnity, the defendant will ordinarily file a third-party complaint, giving plaintiff the opportunity to assert a claim against the third-party defendant.

"The principal reason for the majority rule was tersely stated in McPherson v. Hoffman, 275 F. 2d 466 (6 Cir. 1960), as follows:

> "'Under the Federal Employers' Liability Act the plaintiff could bring his action against the railroad in Federal Court without diversity of citizenship. Section 56, Title 45, U. S. C. A. He could not have sued the McPhersons in Federal Court separately nor could he have joined them with Chesapeake and Ohio because there was no diversity of citizenship between him and the McPhersons, Section 1332, Title 28, U. S. C. What he could not do directly could not be done for him indirectly. The court did not have jurisdiction to enter a judgment against third-parties defendant in favor of the plaintiff Hoffman. Jurisdiction cannot be waived.' 275 F. 2d at 470."

Moreover, in one of its prior decisions the 8th Circuit chose to follow the majority rule and hold contrary to the ruling of Judge Van Pelt in *Olson v. United States*, supra.

In the case of *United States v. Lushbough*, 200 F. 2d 77 (8th Cir. 1951), plaintiff Lushbough brought an action

under the Federal Tort Claims Act against the United States for damages he sustained in an automobile collision. The United States impleaded Hoffman as a third-party defendant, stating he was liable over to the United States for any judgment Lushbough might obtain against it. The District Court found that Hoffman's negligence was the cause of the collision and entered a judgment in favor of the plaintiff Lushbough against the United States and against Hoffman in the sum of $50,000.00. The District Court also awarded judgment against Hoffman on the third-party complaint of the United States. Both the United States and Hoffman appealed from the judgment in favor of Lushbough. This Court in reversing the judgment in favor of Lushbough against Hoffman stated:

> "We think the judgment against Hoffman in favor of Lushbough must also be reversed. Lushbough brought no action against Hoffman, asked for no judgment against him. Rule 14(A) of the Rules of Civil Procedure, 28 U. S. C. provides that: 'The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.' Lushbough asserted no claim against Hoffman. But, conceding for the argument that such an assertion was a formality not required under the Federal Rules of Civil Procedure, Lushbough's right to maintain a claim against Hoffman is prohibited by 28 U. S. C., Section 2676, which provides:
>
> > "'The judgment in an action under Section 1346(B) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.'

"The District Court, having awarded a judgment in favor of Lushbough in his action against the United States, could not in the face of the explicit provisions of the Act order judgment against Hoffman in favor of Lushbough in the same action. Prechtl v. United States, D. D. 84 F. Supp. 889, 890; Lauterbach v. United States, D. C. 95 F. Supp. 479, 482. *Nor is there any showing in the evidence of the necessary diversity of citizenship as between Lushbough and Hoffman.* Since the reversal of the judgment against the United States carries with it the reversal of the judgment for the United States against Hoffman, it is unnecessary to consider Hoffman's contention that the United States could not implead Hoffman as a third-party defendant in the action." (Emphasis added.)

In *Kenrose Manufacturing Co. v. Fred Whitaker Co., supra,* the United States Court of Appeals for the Fourth Circuit set forth the majority view on the subject, stating:

> "Rule 14 of the Federal Rules of Civil Procedure governs third-party practice and it has indeed been held under that rule that, where there is diversity as between plaintiff and defendant, defendant may implead a third party of the same citizenship as the plaintiff. In such case, it may be said that ancillary jurisdiction confers power upon the court over the third-party action.
>
> "Rule 14 also contains language permitting a plaintiff to
>
> > Assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
>
> There is, however, no indication in the rule whether a basis of jurisdiction independent of the main action

must be alleged to support plaintiff's claim against the third-party defendant. Where jurisdiction does not otherwise appear, mere permission, in the rules, to assert a claim, does not itself confer jurisdiction over that claim. By express provision the rules are not to be read as a source of jurisdiction. See Rule 82. To illuminate this point, we must necessarily look elsewhere.

"Many courts have considered whether an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim. See, e. g., Stemler v. Burke, 344 F. 2d 393, 395-396 (6th Cir. 1965); McPherson v. Hoffman, 275 F. 2d 466, 470 (6th Cir. 1960); Patton v. B & O R. R. Co., 197 F. 2d 732, 743 (3rd Cir. 1952); *United States v. Lushbough*, 200 F. 2d 717, 721-722 (8th Cir. 1952); Friend v. Middle Atlantic Transportation Co., 153 F. 2d 778, 779-780 (2nd Cir.), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 2d 1635 (1946); Corbi v. United States, 298 F. Supp. 521 (D. C. Pa. 1969); Palumbo v. W. Md. Ry. Co., 271 F. Supp. 361 (D. C. Md. 1967).

"Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule prevents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should

not reach out for state law based litigation." (Emphasis added.)

Even Judge Van Pelt acknowledged the ruling of the majority, yet for some reason failed to follow it. He stated:

> "A number of courts have been impressed with the fact that by not requiring diversity, the plaintiff could assert a claim against a party whom he could not have sued directly in the federal courts without independent jurisdictional grounds. David Crystal, Inc. v. Cunard S. S. Co., 223 F. Supp. 273 (S. D. N. Y. 1963); LaChance v. Service Trucking Co., 208 F. Supp. 656 (D. Maryland 1962); Pasternack v. Dalo, 17 F. R. D. 420 (W. D. Pa. 1955); Welder v. Washington Temperance Ass'n, 16 F. R. D. 18 (D. Minn. 1954); (Dictum) *United States v. Lushbough,* 200 F. 2d 717, 721 (8th Cir. 1952); Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E. D. N. Y. 1941). The same decisions express the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of third party practice." (Emphasis added.)

The trial court in its Memorandum addressed to the defendant's motion to dismiss for lack of subject matter jurisdiction (C. A. Appendix I, p. 85), stated that the rule that an independent basis of jurisdiction need not exist in order for the plaintiff to assert a claim against a third party was once a minority view, but that the trial court believed it to be correct.

Petitioner emphasizes that this still clearly remains the minority view. No court of appeals in any circuit in the Federal Judicial System has ever followed the minority view, and, in fact, those addressing the issue have criticized and dismissed the minority view as being

contrary to the intent and purpose of the Federal Rules and certainly, contrary to the comments of the Advisory Committee concerning Rule 14.

Other district courts sitting in the Eighth Circuit have chosen to follow the majority rule. For example, in *Welder v. Washington Temperance Association,* 16 F. D. R. 18 (1954), the United States District Court for the Division of Minnesota, Second Division, stated:

> "The interpleading of the third-party defendant brought in the plaintiff's amended complaint places residents of Minnesota on both sides of the case, thereby destroying the basis of this court's jurisdiction.
>
> "Rule 14 of the Federal Rules of Civil Procedure, 28 U. S. C. A., was intended to avoid delay and multiplicity of actions and should be liberally construed, but not to the extent of permitting such construction to extend the jurisdiction of the court. What plaintiff proposed to accomplish by his amended complaint was in effect to substitute another cause of action for that originally commenced by him. This he cannot do."

2. The decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with the pronouncement of this Court in United Mine Workers of America v. Gibbs, 86 S. Ct. 1130, 383 U. S. 715 (1966).

But even if it be assumed that the minority view is correct, the jurisdictional limit of a federal district court

had never been extended to that which it has in the present action. The trial court acknowledged that:

> "This case is nevertheless novel, in that the third-party plaintiff was dismissed." (C. A. Appendix I, p. 85).

The holding of the trial court in this matter is likewise novel in finding that jurisdiction existed between citizens of the same state in the Federal Court, where no federal question was presented and the main cause of action between plaintiff and defendant, OPPD, had been dismissed prior to trial at defendant's request. Prior to the trial court's decision, jurisdiction has never been allowed to exist in a similar situation. The trial court stated:

> "However, having determined that ancillary jurisdiction exists, it is only equitable that the court now retain jurisdiction of this 'pendent' claim." (C. A. Appendix I, p. 86).

In *Kenrose Manufacturing Co. v. Fred Whittaker Co.*, 53 F. R. D. 491 (1971), the plaintiff attempted to make a claim against the third party defendant. The Court stated:

> "This court agrees with the majority view that when plaintiff amends his complaint to assert a direct claim against a third-party defendant of the same citizenship as plaintiff, there no longer exists diversity with regard to the main action. Furthermore, this court feels that diversity existing between an original plaintiff and a defendant is required to support any claims based on ancillary jurisdiction. Since that diversity was destroyed when the plaintiff amended his complaint to assert a claim against a co-citizen there no longer exists a basis for utilizing ancillary jurisdiction."

The Court in *Kenrose* then emphasized the distinction between the case which was before it and the cases following the minority views stating:

> *"Furthermore, in the case at bar, the third-party plaintiff has voluntarily moved to dismiss his third-party complaint against Kilodyne. This court is of the opinion that this factor distinguishes this case from the cases following the minority view, in that, in those cases the third-party complaint was not withdrawn but remained in the action.* By analogy, this court finds that the principle laid down in the case of State of Maryland to Use and Ben. of Wood v. Robinson, 74 F. Supp. 279 (D. Md., 1947), applies to the case at bar. *Robinson,* supra, involved an action by Virginia plaintiffs and the Maryland defendant, parties to the main action, settled their dispute out of court. Afterwards, the third-party defendants filed a motion to dismiss the third-party complaint for lack of diversity of jurisdiction. The Court, in granting that motion, rejected the general proposition that once jurisdiction properly attaches, it will not ordinarily be defeated by changes in situation.
>
> "In the case at bar, this Court feels that the same principles should apply. *Since the third-party plaintiff has voluntarily moved for a dismissal of its claim against the third-party defendant, and that motion has been granted, the basis for allowing a direct complaint by the plaintiffs against Kilodyne, without an independent basis of jurisdiction, no longer exists.* That third-party complaint was the only foundation upon which the plaintiff could, relying on the minority view, support his claim that no independent basis of jurisdiction is necessary. For the above reasons, this Court feels that it is without jurisdiction to decide the plaintiff's amended complaint against Kilodyne, Inc." (Emphasis added.)

In the case of *Municipal Leasing System, Inc. v. Northampton National Bank of Easton,* 382 F. Supp. 968

(1974), the United States District Court for the Eastern District of Pennsylvania, Judge VanArtsdalen stated:

> "Count IV 'alleges liability and seeks relief pursuant to the ancillary jurisdiction' of the court. In plaintiff's brief, it is conceded that this count, depending on ancillary jurisdiction is only maintainable if there is some independent basis for federal jurisdiction arising out of one or more of the other counts. The count apparently charges that the defendant bank improperly made charges against plaintiff's bank account, refused to honor certain checks drawn against the account and in other ways 'mishandled' plaintiff's bank account. This is purely a matter for state court determination. There being no diversity jurisdictional basis, *and in view of the dismissal of all other counts,* this cause of action must likewise fall." (Emphasis added.)

In the case of *Andrews v. Central Surety Insurance Company,* 295 F. Supp. 1223 (1969), the United States District Court for the District of South Carolina, Judge Simons, stated:

> "The ancillary jurisdiction of the federal courts recognized by the foregoing authorities would not extend to a situation *where the main suit had been fully concluded and there were no assets actually or constructively within the court's possession and control as a result of the principal suit.* Such was the case in Bounougias v. Peters, 369 F. 2d 247 (7th Cir. 1966). In that case the original tort action filed and tried in the federal district court in connection with Bounougias' injuries had been completely terminated and its judgment satisfied and all funds distributed before the attorney's suit for his fee was commenced. The court held under such circumstances that the district court had no jurisdiction since 'the district court had no property connected with this litigation in its custody or control.'" (Emphasis added.)

In denying Petitioner's motion for dismissal on the basis of lack of subject matter jurisdiction, the trial court also relied on the case of *United Mine Workers of America v. Gibbs,* 86 S. Ct. 1130, 383 U. S. 715 (1966). The trial court quoted from Moore's Federal Practice, stating:

> "Properly read, *United Mine Workers* [*v. Gibbs,* 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case,* i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27[1], 14-569 to 14-570."

However, in *Gibbs* this Court was dealing with pendent jurisdiction and not with the question of ancillary jurisdiction. But the approach of this Court in that case is indeed pertinent to the plea of the petitioner in this action. It is true that in *Gibbs* this Court stated that if the federal and state claims "derive from a common nucleus of operative fact". If the plaintiff would ordinarily be expected to try all of his claims in one judicial proceeding; and, if the federal issues are substantial in character, then there is power in the federal court to hear all claims. The *Gibbs* opinion indicated, however, that such power is not required to be exercised in every case even though it is found to be in existence. Therefore, pendent jurisdiction is a "doctrine of discretion not of plaintiff's right." This Court then stated:

> "Its justification lies in considerations of judicial economy, convenience, and fairness to litigants; if

> these are not present, a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply State law to them, *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, but procuring for them a surer-footed reading of applicable law. *Certainly, if the Federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."* (Emphasis Added.)

This statement has been consistently construed to limit the discretion of the district court.

In the recent case of *Gibson v. First Federal Savings & Loan Association of Detroit,* 504 F. 2d 826 (1974), the United States Court of Appeals for the Sixth Circuit rigidly applied this Supreme Court mandate. The Court stated therein:

> "In the absence of a substantial federal claim related to asserted state claims in such a way that the entire case may properly be deemed one 'case', federal courts do not have jurisdiction over purely state claims. *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 725, 86 S. Ct. 59, 15 L. Ed. 2d 58 (1966). *Dismissal of all federal claims before trial requires dismissal of state claims as well.* Id. at 726, 86 S. Ct. 59. A state court is the proper forum for adjudication of issues of general law, particularly where questions of fiduciary relationships are involved." (Emphasis added.)

See also *Kurtz v. State of Michigan,* 548 F. 2d 172 (6th Cir. 1977) wherein the Court stated:

> "Since all portions of the claims in this cause of action which arise under federal law have now been dismissed, the state law claims are no longer pendant

> and must be dismissed likewise. See United Mine Workers v. Gibbs . . ."

and, *Hodge v. Mountain States Tel. & Tel. Co.,* 555 F. 2d 254 (9th Cir. 1977), wherein the Ninth Circuit Court stated:

> "When a district court dismisses all federal claims prior to trial, it should not retain jurisdiction over pendant state claims."

The Eighth Circuit, however, claims dismissal of the federal claims prior to trial "is but one factor, among many others, to be considered" by the Court in exercising its discretion to retain jurisdiction of state law claims.

If, as the Court in Kenrose stated, the dismissal prior to trial of the Defendant with whom an independent basis of jurisdiction existed does distinguish those cases following the minority view from those adhering to the majority view it is then of great import to note that the Defendant OPPD was not dismissed from this action until October 1, 1975 (C. A. Appendix I, p. 42) after the statute of limitations had run. Petitioner certainly could not control the dismissal of the Defendant OPPD by the trial court and could not insist that OPPD be dismissed prior to the running of the statute of limitations, so that it could assert its claim that no independent basis of jurisdiction existed between respondent and petitioner based on the distinction of *Kenrose.*

3. The decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with the pronouncement of this Court in Aldinger v. Howard, 96 S. Ct. 2413 (1976).

In *Aldinger v. Howard*, 96 S. Ct. 2413 (1976), this Court addressed the question of whether a plaintiff who asserted a claim against one defendant could implead a different defendant on a state law claim where there is no independent basis of federal jurisdiction, merely because the claim of the plaintiff against both defendants "derived from a common nucleus of operative fact."

In an opinion by Mr. Justice Renquist, this Court stated:

> "The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. *But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.' Ibid.* True, the same considerations of judicial economy would be served insofar as plaintiff's claims 'are such that he would ordinarily be expected to try them all in one judicial proceeding . . .' Ibid. *But the addition of a completely new party would run counter to the well-established princi'e that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.* We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, 512 F. 2d 890, 894 (C. A. 4, 1972):
>
> "'The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence of absence of jurisdiction. Especially is this true where as here the efficiency plaintiff seeks so avidly is available without question in the state courts.'" (Emphasis added.)

This Court quoted with approval the language of Judge Sobeloff in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, supra. That case was cited extensively by appellant in its original brief filed herein. This Court emphasized that "the addition of a completely new party would run counter to the well-established principle that federal courts as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by the Congress." In the words of Judge Sobeloff in the *Kenrose Mfg. Co., Inc.* case, "the efficiency the plaintiff seeks so avidly is available without question in the state courts."

Aldinger holds that where jurisdiction is based not on diversity of citizenship but on a federal statute otherwise conferring jurisdiction over the subject matter, a claim based on state law against an entirely different defendant over which there is no independent basis of federal jurisdiction will only be allowed where the Court satisfies itself (1) that Art. III of the United States Constitution permits it and (2) that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." But jurisdiction does

not exist in a factual situation such as that which is before the Court in the instant matter. It is stated in *Aldinger*:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of the state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derived from a common nucleus of operative fact.'"

This Court then emphasized:

> "That the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress."

This is especially so where the plaintiff may seek his remedy in the state court. In the instant matter, respondent's remedy was available in the state court. There was no jurisdiction.

In the case of *Fawvor v. Texaco, Inc.*, 546 F. 2d 636 (5th Cir. 1977) the Fifth Circuit Court of Appeals construed the case of *Aldinger v. Howard*, supra. Relying on that decision plus the decision of the Fourth Circuit in *Kenrose Manufacturing Company, Inc. v. Fred Whitaker Co., Inc.*, supra, the court stated:

> "The authorities and cases cited above convince this Court that an independent ground of jurisdiction is necessary in order to support plaintiff's claim against the third-party defendant. No questions of federal law are involved in either the original action or in plaintiff's action against the third-party defendant. The basis of jurisdiction in the original complaint is diversity, but no diversity exists between the plaintiff and the third-party defendant. Neither is there any other basis for the federal court's assertion of jurisdiction over plaintiff's direct claim against the third-party defendant. This is not a situation where the same plaintiff and defendant seek to join a state claim with a federal claim. Although it is true that the defendant-third-party plaintiff has already brought in the third-party defendant, the defendant-third-party plaintiff had no choice as to forum, and neither did the third-party defendant. Not only did plaintiff have its choice of forum, but in fact it could and did file the same action in state court. The Constitution, statutes, rules of procedure, judicial precedent and public policy dictate that this Court not broaden the jurisdiction of the federal courts any more than that clearly permitted by law. Therefore, this Court concludes that an independent basis of jurisdiction is necessary for a plaintiff in a diversity action to assert a non-federal claim against a non-diverse third-party defendant."

The decision of the Eighth Circuit in the instant matter most certainly conflicts with this decision of the Fifth Circuit in *Fawvor v. Texaco, Inc.*, supra.

4. The finding of fact made by the Eighth Circuit Court of Appeals violates petitioner's rights under the Fifth Amendment to the United States Constitution.

Petitioner respectfully submits that the United States Court of Appeals for the Eighth Circuit in its opinion

filed June 21, 1977, made findings of fact which are not supported by the record on appeal. The court misapprehended several points of law which are in direct conflict with the decisions of other circuits and decisions of this Court.

A finding was made concerning the conduct of petitioner when that issue was never before the trial court. The appellate court so concluded without giving petitioner an opportunity to introduce evidence at a properly conducted hearing, in violation of the due process clause of the 5th Amendment of the United States Constitution.

The court's opinion unequivocally claims petitioner has perpetrated acts of fraud, not only upon respondent but upon the Federal judicial system.

It is one thing for the trial court to assume jurisdiction where none in fact exists, yet it is still another for the Eighth Circuit to justify its holding by claiming fraud on the part of the petitioner. The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit. Yet, a finding was made on appeal that petitioner concealed the issue of diversity of citizenship until the statute of limitations had run so as to gain "a substantial advantage" over respondent. The factual findings, however, were not merely limited to a determination of concealment. The court elected to publish what it contended to be the strategy underlying this fictional tactic of concealment, without ever having had the advantage of evidence concerning the same.

> "By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly, or, indeed if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists it is clear to all that jurisdiction may be challenged by anyone at any time." (Court's Opinion, Page 24).

Now petitioner is not only expected to bear the loss, but must wear the stain of indignity inherent with allegations and findings of underhanded, unethical conduct.

Petitioner takes e x c e p t i o n to the findings of the Eighth Circuit on the issue of concealment and the motives therefor, when no hearing has been had. The evidence in the record sustained no finding other than that petitioner was remiss in not raising the jurisdictional issue at an earlier stage of the proceedings.

The only issue before the trial court was that of whether pendant or ancillary jurisdiction existed. Respondent's counsel commented on the lateness of the defendant's claim of no diversity of citizenship (C. A. Appendix II, pp. 156, 157).

Defendant's attorney countered that argument and the court agreed. The colloquy between the court and counsel was as follows:

> "Mr. Johnson: Also in regard to his initial comment about our lateness in raising this, I would just say this—
>
> The Court: That can be raised at any time.
>
> Mr. Johnson: That is right. This is not an equitable case.
>
> The Court: That has been the rule since time began.

(Page 207) Mr. Johnson: As to laches, estoppel, or waiver, the Court either has it or it doesn't.

The Court: The only thing that concerns me is this pendant or ancillary question. . . ." (C. A. Appendix II, pp. 159, 160).

If the trial court had indicated during the trial that concealment was an issue, Petitioner could have offered evidence in support of its innocence. But, the trial court emphasized that the only issue was the existence of pendant or ancillary jurisdiction.

The effect of the Eighth Circuit's finding is that a Federal District Court may now acquire subject matter jurisdiction over a cause of action where there is no diversity of citizenship between the parties by the mere running of the statute of limitations. The further effect of the holding is that a defendant may never raise the defense of lack of subject matter jurisdiction after the statute of limitations has run and any defendant that does so is guilty of concealment and unethical conduct.

Rule 12 (h) (3) provides as follows:

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

That rules emphasizes that a subject matter jurisdiction defect requires dismissal *whenever* that defect becomes apparent, not merely prior to the running of the statutes of limitations on the plaintiff's claim.

In the case of *Page v. Wright,* 116 F. 2d 453 (7th Cir. 1940), the Seventh Circuit stated:

". . . (Jurisdiction) cannot be conferred by agreement, consent or collusion of the parties, whether contained in their pleadings or otherwise, and a party cannot be precluded from raising the question by any form of laches, waiver or estoppel. . . . The answer of the defendant conceding jurisdiction amounted to no more than consent, and as seen, jurisdiction cannot be thus conferred irrespective of whether the consent was the result of an honest mistake or otherwise."

In the initial trial of *Kenrose Manufacturing Co. v. Fred Whittaker Co.,* found at 53 F. R. D. 491 (1971), the trial court stated:

"The plaintiff further contends that the third-party defendant has waived his right to raise this question of jurisdiction since he answered the amended complaint without challenging the lack of diversity jurisdiction. In support of this contention the plaintiffs rely on Rule 12 (h) of the Federal Rules of Civil Procedure. The plaintiffs' contention is without merit. Lack of diversity of citizenship of the parties is a lack of the federal court's subject matter jurisdiction. The third-party defendant's motion to dismiss falls therefore within Rule 12 (b) (1) of the Federal Rules. A Rule 12 (b) (1) motion to dismiss raises a question of the federal court's subject matter jurisdiction and is most typically used, as in this case, when there is no diversity of citizenship. *A motion attacking the court's subject matter jurisdiction may be made at any time by either party or by the court sua sponte.* If the court lacks subject matter jurisdiction, it lacks the power to hear the case. 5 Wright & Miller, Federal Practice and Procedure, § 1350 (1969). While it is true that Rule 12 (h) would treat a motion to dismiss for lack of jurisdiction over the person as waived if not timely made, such is not the case when the court's subject matter jurisdiction is challenged." (Emphasis added.)

The amended complaint of respondent against the petitioner was filed November 9, 1973 (C. A. Appendix I,

p. 23), approximately two months prior to the running of the statute of limitations on January 18, 1974. In its answer to amended complaint filed November 27, 1973, petitioner admitted that Owen Equipment and Erection Company was a corporation organized and existing under the laws of the State of Nebraska and denied each and every other allegation in the Respondent's complaint.

The Eighth Circuit found that the petitioner's answer did not comply with the terms of Rule 8 (b). Petitioner emphatically claims that its answer conformed in all respects to the requirements of this rule. It admitted that Owen Equipment and Erection was a corporation organized and existing under the laws of the State of Nebraska and denied all other allegations. Rule 8 (b) specifically provides:

> ". . . the pleader . . . may generally deny all the averments except such averments or paragraphs as he expressly admits; . . ."

Less than two months after petitioner filed its answer to the amended complaint, the statute of limitations ran. No further action on the file occurred until May 23, 1974 when a hearing on OPPD's motion for summary judgment was had before Judge Denney (C. A. Appendix I, p. 31). The statute of limitations had already run more than five months prior to that date. The issue of the lack of subject matter jurisdiction of the court was not raised by petitioner until its motion for dismissal filed January 15, 1976, two days after trial had commenced (C. A. Appendix I, p. 55).

If petitioner were intentionally "sandbagging" the court, why then didn't petitioner wait until the day after

the statute of limitations had run on January 19, 1974 to raise the issue of lack of subject matter jurisdiction, rather than waiting until the second day of trial to raise the issue? Why wouldn't the issue of lack of diversity of citizenship have been raised in the answer which this defendant filed January 13, 1976 (C. A. Appendix I, p. 49)?

The only reason this issue was not raised at an earlier point in the proceedings was that counsel failed to recognize that as an issue. During trial appellant's corporate counsel, Robert Becker of the law firm of Swarr, May, Smith & Andersen, advised Attorney David A. Johnson who was trying this case on behalf of Owen Equipment and Erection Company that Owen was a Nebraska corporation, but that its principal place of business was in Iowa, and that there was no subject matter jurisdiction. Shortly thereafter, a motion to dismiss was filed on behalf of Owen Equipment and Erection Company. This is the first time this matter was given any consideration by petitioner. (See affidavits of corporate and trial counsel from petition for rehearing in Appendix C, App. pp. 38-39.)

Likewise, it is obvious that the matter was never considered to be an issue by counsel for respondent who took at least four pre-trial depositions in the corporate office of defendant in Carter Lake, Iowa. Two of these depositions were taken of corporate officers.

But it is beyond the understanding of petitioner how the issue of concealment could even come before the 8th Circuit. The rule in the Eighth Circuit as well as other circuits throughout the nation has unanimously been *that*

there is a presumption against the existence of Federal jurisdiction, and thus the party involving the Federal court's jurisdiction bears the burden of proof as to its existence. See *Basso v. Utah Power and Light Co.,* 495 Fed. 2d 906 (10th Cir. 1974); *Emmke v. DeSilva,* 293 Fed. 17 (8th Cir. 1923).

The burden rested on the respondent to overcome the presumption. Respondent discovered as early as June 3, 1974 that the principal place of business of Petitioner was Carter Lake, Iowa. On that date at 1:30 P. M. respondent's counsel took the deposition of the President of Petitioner in its office of Owen *in Carter Lake, Iowa* (C. A. Appendix II, p. 92). During that deposition the following questions were asked of Mr. Owen by respondent's counsel:

> "Q. And would you tell me where the headquarters of Owen Equipment and Erection Company is?
>
> A. Here, same headquarters.
>
> Q. Same headquarters.
>
> A. Yes. . . .
>
> Q. I have the impression in my mind's eye, and I don't know, that you have the headquarters at the same place and you have the same officers and it seems to be operated out of the same place. Is one company just the same as the other?" (C. A. Appendix II, p. 95).

On the 24th day of November, 1972 respondent filed her complaint wherein she alleged under paragraph 5 as follows:

> "That on January 18, 1972, plaintiff's decedent was employed working in the capacity of a machinist for the defendant, Paxton and Vierling Steel Company at *its place of business in Carter Lake, Iowa.* . . ." (Emphasis added.) (C. A. Appendix I, p. 4).

So on the 3rd day of June, 1974, respondent knew that it could not go forward with its burden of proving subject matter jurisdiction. However, the Eighth Circuit chose to believe that petitioner connived respondent and the trial court and concealed from both the principal place of business of the petitioner until the second day of trial.

Isn't it just as conceivable that the exact opposite conclusion could have been reached by the Eighth Circuit on these same facts? After June 3, 1974, it certainly would have behooved respondent to conceal the jurisdictional issue. Respondent had nothing to lose for the statute had already run. She could later claim tardiness when the petitioner raised the issue.

The court relies heavily on the case of *Di Frischai v. New York Central Railroad,* 279 Fed. 2d 141 (3rd Cir. 1960) as authority for its findings. In his treatise of Law of Federal Courts, Wright questions this decision stating:

> "This argument seems to assume that the court has discretion to hear a case where jurisdiction is not present, a very questionable assumption." Law of Federal Courts, Charles Alan Wright, West Publishing Co., 1970, page 17.

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CONCLUSION

The decision of the Eighth Circuit Court of Appeals in this matter most certainly conflicts with the decisions of every other circuit which has addressed the question presented by this Petition. A federal court may not exercise discretion to retain jurisdiction over a claim where jurisdiction in fact does not exist. There is no such power in the federal judicial system. This petitioner respectfully submits that the trial court did not have jurisdiction over the subject matter of the action and thus had no power to enter the verdict and resultant judgment against this petitioner. A plaintiff may not sue a defendant having a common state citizenship with the plaintiff in a United States District Court in any state; but, both the trial court and the Eighth Circuit Court of Appeals in this matter allowed the maintenance of such an action.

Petitioner has been found to have concealed the issue of its citizenship from both the court and the respondent. Information concerning the citizenship of the petitioner was equally available to respondent and petitioner, yet both the trial court and the Eighth Circuit have chosen to place the responsibility for respondent's failure to prove citizenship upon the defendant. Claims of concealment have been manufactured against this petitioner so that the judgment in the amount of $234,756.00 in favor of the plaintiff may be allowed to stand. There is no constitutional or statutory power given to any court to create jurisdiction when it is absent.

If this decision is allowed to stand then no defendant may ever raise the issue of lack of subject matter

jurisdiction of a court after the statute of limitations has run.

All federal courts, by virtue of this decision, may now acquire jurisdiction once the statute of limitations runs, whether or not the requisite diversity of citizenship is present. Such a rule cannot be allowed to exist.

The Eighth Circuit has concluded that the petitioner has played "fast and loose with the judicial machinery", yet the only act of which petitioner is guilty is answering in accordance with Rule 8b of the Federal Rules of Civil Procedure.

This petitioner, therefore, respectfully requests that this court grant a writ of certiorari to the United States Court of Appeals to the Eighth Circuit to review the opinion and judgment of the Eighth Circuit Court of Appeals, rendered in these proceedings on October 16, 1977.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1187

GERALDINE KROGER, ADMINISTRATRIX OF THE ESTATE OF JAMES D. KROGER, DECEASED,

Appellee,

vs.

OWEN EQUIPMENT & ERECTION COMPANY,
a Nebraska Corporation,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Submitted: November 10, 1976

Filed: June 21, 1977

Before LAY and BRIGHT, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

This case involves the death of a workman assisting in moving a large steel tank. The tank was being moved by a large crane, the boom of which came into contact with high tension electric power lines, resulting in the workman's electrocution. At the time the deceased was 28 years of age with a wife and four children. The plaintiff, his widow, as administratrix of his estate, was awarded a jury verdict of $234,756. We affirm.

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*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

The crane involved was owned by the Owen Equipment and Erection Company (hereafter "Owen"), and leased by Paxton & Vierling Steel Company (hereafter "Paxton") for heavy lifting. The case was initiated by a bill of complaint filed by plaintiff, an Iowa citizen, against Omaha Public Power District (hereafter "OPPD"), a Nebraska corporation, and Paxton, also a Nebraska corporation. The course of the pleadings thereafter was long and involved and will be found in the Appendix hereto. We note here only that Owen was impleaded as a third-party defendant by OPPD.

The relationship between defendant Owen and Paxton was somewhat involved. Paxton was engaged in the fabrication of structural steel and the manufacture of farm and similar products. It is a non-union plant. To avoid possible labor trouble in "erecting steel on the outside, which is strictly a union proposition," it formed Owen, both corporations having the same headquarters and the same officers, Owen being 100% owned by Paxton. Owen owned two cranes, operated by Fred (father) and David (son) Morrow, both of whom were on Paxton's payroll. Both of them held union cards. It was David who was operating the crane at the time of decedent's death.

After Owen was organized it hired one Harry Flynn, a qualified crane operator and member of the crane operator's union, to be its erection superintendent. It was he who trained Fred Morrow in the use and upkeep of the cranes and it was Fred himself who trained his son on the job. Fred Morrow retired in 1969. Mr. Flynn retired shortly before the accident and was not replaced

by a successor. David Morrow then remained the sole operator qualified to operate Owen's big outside cranes. When Paxton required the big cranes, the operators went with the crane and "they ran that crane." Mr. Owen, President of Owen, agreed in his deposition that it "wouldn't do [Owen] a bit of good to own those cranes unless [Owen] had operators for them • • •."

After long and involved pleadings, a summary of which, as we have noted, will be found in the Appendix, the parties had, by trial date, January 12, 1976, been reduced to two: plaintiff Kroger, an Iowa citizen, and defendant Owen, charged to be "a Nebraska corporation," and consistently self-admitted in the pleadings to be such.

So stood the description of the parties until noon on the third day of the trial. At this juncture, defendant Owen elicited from witness Petersen, Secretary of Owen, that Owen's principal place of business was in Carter Lake, Iowa. Having done so, defendant, the same afternoon, challenged the jurisdiction of the court on the ground of lack of diversity.

The court and the plaintiff were taken by surprise because of defendant's pleadings. Plaintiff's amended complaint, filed on November 9, 1973, some two years prior to trial, had unequivocally charged that "Owen Equipment and Erection Co. is a Nebraska corporation with its principal place of business in Nebraska." Defendant had not denied this outright. It had utilized a qualified general denial. It "[a]dmit[ted] that Owen Equipment and Erection Company is a corporation organized and existing under the Laws of the State of Nebraska," and "[d]enie[d] each and every other allegation

contained in said Amended Complaint • • •." This form of answer was in violation of Fed. R. Civ. P. 8(b) which provides that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and deny only the remainder."[1] Thus, defendant's admission of part of an averment and denial of the balance in a qualified general denial clearly does not meet the requirements of the Rule quoted. Nor, as also required by Rule 8(b), does it fairly meet the substance of the averment denied.

Appellant finally admitted on oral argument to us, after close questioning, a point clear from the pleadings, namely, that it had not specifically challenged the diversity jurisdiction of the court at any time during the long course of the pleadings, and particularly had not done so in response to the plaintiff's amended bill of complaint, filed on November 9, 1973, charging Owen to be "a Nebraska corporation with its principal place of business in Nebraska." Owen waited until near the close of the trial to make its challenge. The point had been concealed during the entire period of time since the filing of the amended complaint some two years theretofore. Under

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1 *See Kirby v. Turner-Day & Woolworth Handle Co.*, 50 F. Supp. 469, 470 (E. D. Tenn. 1943); 2A *Moore's Federal Practice* ¶ 8.23, at 1828 (2d ed. 1975) (hereafter *"Moore's"*); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1266, at 284 (1969) (hereafter *"Wright & Miller"*).

similar circumstances, the Third Circuit has held the allegation as to defendant's citizenship to be admitted.[2]

The District Court rejected the challenge to its jurisdiction, holding, in its Memorandum Opinion, that although no independent basis of jurisdiction existed as to Owen, nevertheless it had discretion under the *Gibbs* case,[3] to exercise its judicial power over the case. It held, in part, that:

> The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. *See Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Alson v. United States*, 38 F. R. D. 489 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.
>
> Properly read, *United Mine Workers* [v. *Gibbs*, 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27[1], 14-569 to 14-570.

2 In *Biggs v. Public Service Coordinated Transport*, 280 F. 2d 311 (3d Cir. 1964), the pleader asserted a proper amount in controversy, and, further, that defendant was a New Jersey corporation doing business in Pennsylvania. Defendant's answer specifically denied that the amount in controversy was in excess of the statutory minimum, but the allegation that defendant was incorporated in New Jersey was only met by a qualified general denial. The *Biggs* court held:

> We cannot for a moment believe that defendant's counsel was denying in good faith that his client was a New Jersey corporation. We think the only fair interpretation of the pleading in this case is that the denial does not run to the allegation of defendant's citizenship. *Therefore, that allegation must be deemed to be admitted.* Fed. R. Civ. P. 8 (d).

280 F. 2d at 313-14 (footnote omitted; emphasis added).

3 *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966).

This case is nevertheless novel, in that the third party plaintiff was dismissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this "pendent" claim.[4] Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run.[5] Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction.

The problem presented arises in the area of ancillary and pendant jurisdiction. We start, of course, with the

4 The Court is aware that "pendent jurisdiction" refers to state claims joined with federal claims and uses the term here in its ordinary context. (Footnote in original.)

5 We express no opinion on this point, it not having been briefed by either party hereto and being only one of the factors to be considered in the exercise of the Court's discretion. (Footnote ours.)

proposition that federal courts are courts of limited jurisdiction.[6] However, under the developing doctrines of pendent and ancillary jurisdiction,[7] there has been expansion of federal jurisdiction into areas which ordinarily do not come under the jurisdiction of the federal courts. The limits of this expansion are our immediate concern.

Modern analysis starts with the landmark decision in *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966).[8] In this case, the plaintiff, a mining superintendent and hauling contractor, was prevented from the performance of his contract by a local union which had forcibly prevented the opening of the mine. Suit was brought in the federal court alleging violation of section 303 of the Labor Man-

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6 U. S. Const. art. III, § 2; Act of Sept. 24, 1789, 1 Stat. 73 (Judiciary Act).

7 Differentiations of many kinds may be made between the doctrines of ancillary and pendent jurisdiction. As to the utility thereof, *see Aldinger v. Howard,* 427 U. S. 1, 13 (1976):

> Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.

The historical development of both of these doctrines, which had disparate origins, may be found in Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U. C. L. A. L. Rev. 1263, 1265-70 (1975) (and cases and articles therein cited); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 Colum. L. Rev. 1018 (1962); Note, *Rule 14 Claims and Ancillary Jurisdiction,* 57 Va. L. Rev. 265, 267-72 (1971).

8 For a discussion of *Gibbs,* see Note, *UMW v. Gibbs and Pendent Jurisdiction,* 81 Harv. L. Rev. 657 (1968).

agement Relations Act,[9] to which was joined a state claim for malicious interference with contract rights. Plaintiff prevailed on both claims, but upon motion for judgment n. o. v. the federal claim was held non-actionable and judgment entered on the state claim, with affirmation by the Court of Appeals following.[10]

The Supreme Court affirmed the assumption of jurisdiction over the pendent state claim.[11] The significance of the *Gibbs* case for our purposes lies in its discarding of the test established in *Hurn v. Oursler,* 289 U. S. 238, 246 (1933), for pendent jurisdiction, under which pendent jurisdiction was present when "two distinct grounds in support of a single cause of action[12] [were] alleged, one only of which present[ed] a federal question," but not "where two separate and distinct causes of action [were] alleged, one only of which [was] federal in character." In place of the *Hurn* test, the Court held that pendent jurisdiction is present whenever the state and federal claims "derive from a common nucleus of operative fact" to the degree that a plaintiff would "ordinarily be expected to try them all in one judicial proceeding."[13] If, the Court continued, the state claim is so related to the

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9 29 U. S. C. § 187.

10 *Gibbs v. United Mine Workers,* 343 F. 2d 609 (6th Cir. 1965).

11 In dealing with the merits, however, the Court reversed.

12 This phraseology had caused much difficulty in the lower courts due to the metaphysical nature of "cause of action." *See Gibbs, supra,* 383 U. S. at 722-24; Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, supra* note 7, at 1029-30. (Footnote ours.)

13 383 U. S. at 725.

federal claim that there is "but one constitutional 'case'," there is power to exercise pendent jurisdiction and it is "unnecessarily grudging" to limit the availability of pendent jurisdiction more narrowly than is constitutionally required.[14]

Owen, as noted *supra,* was impleaded by OPPD as a third-party defendant pursuant to Fed. R. Civ. P. 14 (a).[15]

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14 *Id.* at 725.

15 "(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. * * *."

The provisions of Rule 14 (a) governing third-party practice are extremely broad, permitting the third-party defendant to assert against the plaintiff "any claim * * * arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff," and the plaintiff to assert against the third-party defendant "any claim * * * arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

Rule 14, however, is silent as to whether independent jurisdictional grounds are required for such claims and thus arises our question. It is to be noted, however, that Rule 14 (a) does not by itself extend the jurisdiction of the federal courts.[16] It is clear that many of the claims which Rule 14 (a) permits to be joined with the main claim asserted by the plaintiff have been allowed without an independent basis of jurisdiction under the doctrine of ancillary jurisdiction. Professors Wright and Miller state that "'[t]he cases on point almost all hold that defendant's claim against a third-party defendant is within the ancillary jurisdiction of the federal courts,"[17] even though there may be no diversity between these parties. *See, e. g., Waylander-Peterson Co. v. Great Northern Ry. Co.,* 201 F. 2d 408, 415 (8th Cir. 1953). The courts have also allowed, without an independent basis of jurisdiction, the third-party defendant's claim against the plaintiff, arising

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16 Fed. R. Civ. P. 82 provides:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *.

17 6 *Wright & Miller* § 1444, at 223 (footnote omitted).

out of the same transaction as the plaintiff's main claim.[18] Since much of what we are about to write concerns diversity, we think it not inappropriate to point out that such action against the plaintiff has been held to be within the court's ancillary jurisdiction, even when the main claim is based upon diversity jurisdiction and both the third-party defendant and plaintiff are citizens of the same state.[19] Thus, in view of the breadth of Rule 14 (a), combined with current ancillary and pendent jurisdiction doctrine it is not unusual for courts to adjudicate ancillary claims having no independent jurisdictional basis.[20]

On the other hand, the great numerical majority of cases have held that if the plaintiff asserts a claim against the third-party defendant, as permitted by Rule 14 (a), there must be independent grounds for jurisdiction.[21] The

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18 *See Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F. 2d 709 (5th Cir. 1970), but note comments thereon in *Fawvor v. Texaco, Inc.*, 546 F. 2d 636, 642 (5th Cir. 1977); *General Dynamics Corp.*, 486 F. 2d 763, 772 (7th Cir. 1973), *cert. denied*, 414 U. S. 1146 (1974) (adopting the reasoning of the Fifth Circuit in *Revere Copper); L & E Co. v. U. S. A. ex rel. Kaiser Gypsum Co.*, 351 F. 2d 880, 882 (9th Cir. 1965).

19 *See, e. g., Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., supra* note 18.

20 For a summary of the many instances in which the district courts adjudicate ancillary claims having no independent jurisdictional basis, see 13 *Wright & Miller* § 3523, at 66-70.

21 *See, e. g., Fawvor v. Texaco, Inc., supra* note 18. *But see, e. g., Morgan v. Serro Travel Trailer Co.*, 69 F. R. D. 697 (D. Kan. 1975) (holding that plaintiff, in appropriate cases, may assert a claim against third-party defendant without there being an independent basis of jurisdiction). The cases pro and con on whether independent jurisdictional grounds are required for plaintiff to assert a claim against third-party defendant are gathered in *Fawvor, supra*, 546 F. 2d at 639 n. 7, and in Note, *Rule 14 (a) and Ancillary Jurisdiction: Plaintiff's Claim Against Non-Diverse Third-Party Defendant*, 33 Wash. & Lee L. Rev. 796, 798-99 nn. 10-12 (1976).

older, pre-*Gibbs*, cases, including one from our court,[22] support the proposition with almost complete unanimity,[23] as did the first edition of Prof. Moore's treatise.[24]

After the landmark decision in *Gibbs*, however, the underpinnings of the restrictive rule were swept away. Prof. Moore's later edition, following the holding in *Gibbs*, submitted that the matter of accepting jurisdiction should be within the trial court's discretion, arguing trenchantly that:

> Properly read, *United Mine Workers* reemphasizes the fundamental principal that a federal court has *jurisdictional power* to adjudicate the *whole case, i. e.*, all claims, state or federal, which derive from a common nucleus of operative facts. Thus it is now possible for lower federal courts to reach decisions allowing jurisdiction over some joined claims and parties, which previously would probably have been rejected for lack of subject matter jurisdiction. If *United Mine Workers* does signal such relaxation of the prohibitory rule as to original joinder of claims and parties, then, consequently its corrollary rule forbidding

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22 *United States v. Lushbough*, 200 F. 2d 717 (8th Cir. 1952). We note the holding in *Lushbough* that diversity was required to support a judgment in favor of plaintiff against third-party defendant was an alternative ground of decision, the other ground being that plaintiff was precluded from claiming against third-party defendant by 28 U. S. C. § 2676. In view of developments in the law of pendent and ancillary jurisdiction subsequent to Lushbough, we deem it wise to reexamine the position taken by us in that case on the jurisdictional issue at bar.

23 *But see L & E Co. v. U. S. A. Kaiser Gypsum Co.*, 351 F. 2d 880, 882 (9th Cir. 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb. 1965); *Myer v. Lyford*, 2 F. R. D. 507 (M. D. Pa. 1942); *Sklar v. Hayes*, 1 F. R. D. 594, 596 (E. D. Pa. 1941).

24 1 *Moore's* § 14.02, at 748 (1st ed. 1938).

ancillary jurisdiction of a claim by the plaintiff against the third-party defendant must also be relaxed.

But regardless of jurisdictional developments under Rules 18 and 20, *United Mine Workers* can authorize an independent relaxation of the rule against ancillary jurisdiction over plaintiff's amended claims against the third-party defendant. At the outset, the question must be redefined. It should not be a question of pure law posing the choice "either there is an ancillary jurisdiction and the court must take it, or there is no ancillary jurisdiction, and the court cannot take it." Instead, since there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. Once this basic redefinition takes place, the traditional reasons given for supporting a rule of flat prohibition do not necessarily disappear. Instead they become factors for the trial court to consider in exercising its discretion.[25]

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25 3 *Moore's* ¶ 14.27 [1], at 14-569 to 14-570 (footnotes omitted; emphasis in original).

In *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F. 2d 890, 893-94 (4th Cir. 1972), Judges Sobeloff, summarized the arguments ogten given in support of the majority view that independent jurisdictional grounds are required in order for plaintiff to assert claim against third-party defendant:

> Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule precents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and

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> third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation. [Footnotes omitted.]

Professor Moore has incisively criticized these arguments in his treatise. *See* 3 *Moore's* ¶ 14.27 [1], at 14-570 to 572. *See also Morgan v. Serro Travel Trailer Co., supra,* 69 F. R. D. at 702-04.

In response to the argument that plaintiff should not be able to do indirectly what he cannot do directly, Professor Moore replies:

> [W]hy shouldn't A. B. [plaintiff] be able to do it indirectly? A. B. took his chance in suing C. D. [defendant] alone in the federal court. It was C. D.'s choice, not A. B.'s, to bring in E. F. [third-party defendant], and now that E. F. is before the court, judicial economy and convenience may dictate that the court dispose of the whole case by allowing all claims deriving from a common nucleus of operative fact.

3 *Moore's* ¶ 14.27 [1] at 14-570 to 571 (footnote omitted).

The argument that the majority rule prevents collusion has been termed "the *raison d'etre*" of that rule; the other arguments being described as "largely 'make-weights'." *Morgan, supra,* 69 F.R. D. at 702-03. Professor Moore states and we agree, that 28 U. S. C. § 1359, which provides that "[a] district court shall not have jurisdiction of a civil action in which any party * * * has been improperly or collusively made or joined to invoke the jurisdiction of such court, is an adequate answer to the specter of collusion." 3 *Moore's* ¶ 14.27 [1], at 14-571. "Fears of collusion do not justify a wholesale denial of jurisdiction." *Id.*

The third argument given in support of the majority rule rests on an overly narrow view of ancillary jurisdiction. Professor Moore puts it this way:

> Ancillary jurisdiction is a much broader concept resting upon multiple reasons of economy and convenience. Thus, it is clearly established that ancillary jurisdiction allows jurisdiction over claims and counterclaims between C. D. [third-party plaintiff] and E. F. [third-party defendant] even though those claims lack diversity and jurisdictional amount and could not have been brought

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The solution to the problem presented as to the District Court's retention of jurisdiction in the case at bar is clearly outlined in *Gibbs*. That decision enunciated a two step process for the resolution of the ancillary-pendent jurisdiction problem: First, the determination of whether or not there is *power* in the federal courts to hear the whole matter. If there is, the Court continues, "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants • • •."[26]

At the time the plaintiff amended her complaint to assert a claim against Owen there is no question but that

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> as original law suits. The same broad principle and result should not be offensive when applied to ancillary jurisdiction between A. B. [plaintiff] and E. F. If E. F. had voluntarily entered the suit as a non-indispensable defendant by intervention under Rule 24(a), there clearly can be ancillary jurisdiction over the claims between E. F. and A. B. The same result should be obtained whether E. F. enters voluntarily under Rule 24 or involuntarily by C. D.'s impleader under Rule 14. In brief, there should be no rule forbidding building one ancillary jurisdiction on another.

Id. at 14-571 to 572 (footnotes omitted).

The fourth argument in support of the majority rule, that federal courts are too busy to "reach out for state law based litigation," rests upon a parochial view of federalism. "If federal courts refuse to use conceptual tools to dispose of all related claims with the greatest economy and convenience, the federal courts then add to the total in-economy and inconvenience which itigants must suffer to obtain justice on the merits of their claims." *Id.* at 14-572 (footnote omitted).

26 383 U. S. at 726 (footnote omitted).

the court had jurisdiction over plaintiff's claim against OPPD and OPPD's third-party claim against Owen,[27] But the question presented is whether the court also had power over the plaintiff-Owen's claim.

Within the framework of the *Gibbs* decision, Kroger's claim against Owen arises out of the core of "operative facts" giving rise to both Kroger's claim against OPPD and OPPD's claim against Owen. All parties were before the court and it is both paradoxical and anomalous to hold in this situation that, although Kroger can go against OPPD which can go against Owen, and Owen may proceed against Kroger, Kroger cannot proceed against Owen. This result is not demanded by Rule 14 and has its origins in the mists of the precedents of earlier days and crystallized concepts that cannot stand the light of searching modern examination.

It is an over-simplification of the result we seek to cast the problem in terms of black and white, that is, jurisdiction or no jurisdiction. The matter is broader than that. Once the court has before it all of the parties to the controversy, sharing common and interrelated facts, it has power in the jurisdictional sense to dispose of the case. To say, in a modern court, under modern rules,[28] that a third-party defendant may sue a plaintiff of the same state, but not the converse, is a monument to the

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27 The power as to the Kroger-OPPD claim rested upon diversity, and as to the OPPD-Owen third-party claim, the court had ancillary jurisdiction. *Waylander-Peterson Co. v. Great Northern Ry. Co., supra;* 6 *Wright & Miller* § 1444, at 223 (quoted *supra* at p. 11).

28 "Under the [Federal Rules of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." *Gibbs, supra,* 383 U. S. at 724 (footnote omitted).

triumph of rule over reason, "a step backward to the time when piecemeal litigation, tactical maneuvering by procedural devices, inconvenience to litigants, duplication of litigation in different courts, and a resulting waste of judicial and litigant time and resources were the hallmarks of formalistic rules of civil procedure."[29]

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29 Note, *Rule 14 Claims and Ancillary Jurisdiction, supra* note 7, at 289.

Owen contends that the recent Supreme Court decision, *Aldinger v. Howard*, 427 U. S. 1 (1976), supports its contention that the District Court was without power to exercise jurisdiction over Kroger's direct claim against it. We disagree.

The *Aldinger* court's holding was a narrow one:

> All that we hold is that where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within [28 U. S. C.] § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of [42 U. S. C.] § 1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction.

Id. at 17-18 n. 12. The *Aldinger* court carefully limited its decision to the context of claims brought under 28 U. S. C. § 1343 (3) and 42 U. S.C. § 1983:

> [W]e decide here only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343 (3) and 1983. *Other statutory grants and other alignments of parties and claims might call for a different result.*

Id. at 18 (emphasis added).

The instant case presents an alignment of parties and claims significantly different from that presented in *Aldinger*. In *Aldinger*, the municipal corporation over which plaintiff sought to have the court assert pendent jurisdiction, was a "new party * * * not otherwise subject to federal jurisdiction." *Id.* The impleading of such a party, presents "a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim." *Id.* In the instant case, Owen was already before the court on OPPD's third-party claim, a state law claim within the court's ancillary jurisdiction. See p. 11 and note 27, *supra*.

The judicial power is there. Whether or not to use it answers to no *ipse dixit*. The question is whether to exercise that power, "considering all the factors of economy and convenience in the context of federalism."[30]

Thus remains the exercise of discretion. And it is for this reason, we are convinced, that we are warned, from the earliest cases to the latest, that there can be no blanket rule governing all cases, no per se dogma to serve as an easy substitute for thought.

> As we indicated at the outset of this opinion, the question of pendent-party jurisdiction is "subtle and complex," and we believe it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction.[31]

The factors governing the exercise of discretion were expressed in *Gibbs* to be "judicial economy, convenience, and fairness to litigants."[32] The satisfaction here of the first two requirements requires no exegesis. It is upon the element of fairness that we shall speak. The defendant before us has connived for himself an unfair advantage. But what he has overlooked in all of this is the court's exercise of discretion in terms of fairness. It is not without significance that well prior to *Gibbs* the discretion of the trial court was relied upon in denying belated challenges to jurisdiction in situations of oppression.[33] In the *Di Frischia* case, after a series of plead-

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30 3 *Moore's* ¶ 14.27 [1], at 14-570.

31 *Aldinger, supra*, 427 U. S. at 18.

32 383 U. S. at 726.

33 *See Di Frischia v. New York Cent. R. R.*, 279 F. 2d 141 (3d Cir. 1960); *Klee v. Pittsburgh & W. Va. Ry.*, 22 F. R. D. 252 (W. D. Pa. 1958).

ings, preparations for trial, and a stipulation of diversity, a defendant sought to amend its answer on the eve of trial, once again bringing up the matter of jurisdiction. The District Court dismissed the action, but the Court of Appeals reversed, resting decision on the discretion vested in the trial court and stating that "[a] defendant may not play fast and loose with the judicial machinery and deceive the courts."[34]

A situation similar in principle and with similar results in the retention of jurisdiction is found in *Murphy*

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34 279 F. 2d at 144. The *Di Frischia* court held in part:

> We are equally cognizant of our holding in Hospoder v. United States, 3 Cir., 1953, 209 F. 2d 427, 429, where we stated:
>
> "It is axiomatic that jurisdiction may not be conferred or waived by the parties and that courts at every stage of the proceedings may and must examine into its existence."

However, the instant case is governed by a different line of authority that is equally well recognized. In Young v. Handwork, 7 Cir., 1949, 179 F. 2d 70, 16 A. L. R. 2d 825, certiorari denied 1950, 339 U. S. 949, 70 S. Ct. 804, 805, 94 L. Ed. 1363, we have a similar state of facts, for after raising the question of lack of diversity in its answer the defendants omitted such question from their amended motion and in open court admitted the facts in plaintiff's complaint. Following determination by the court on the merits, the defendant once again attempted to raise the issue, but the court denied leave to file the amendment and the action was sustained by the court of appeals. Similarly, in the instant case the defendant had its opportunity to have the issue heard and to present its position but chose to admit the allegations of plaintiff's complaint. Thereafter it fully participated in the appropriate discovery and pretrial procedures preparatory to trial of the action on the merits. Having done so, a further attempt to amend its answer to return to its previous defense of lack of diversity could certainly not be made as of right. Allowance of such an amendment under the circumstances would be an abuse of discertion. Cf. Klee v.

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v. *Kodz*, 351 F. 2d 163 (9th Cir. 1965). There the plaintiff's decedent was killed in a mid-air collision, plaintiff bringing action in state court against one Shupe and other parties. Mr. Shupe, alleging that he was an officer of the Forest Service acting in his official capacity at the time of the accident, had the case removed to the District Court, pursuant to 28 U. S. C. § 1442 (a) (1). No head of federal jurisdiction was alleged as to the remaining defendants. The trial resulted in a judgment in favor of Shupe, but the jury was unable to agree on the liability of the other defendants. As to them, a new trial resulted in plaintiff's favor, whereupon defendants moved to remand the case to the state court, arguing that the federal court had lost further jurisdiction of the case upon entry of the judgment for Shupe, who was the sole party entitled to invoke that court's jurisdiction.

The motions were denied by the District Court. The Ninth Circuit affirmed, finding an analogy "in the penumbral area of federal jurisdiction, so-called ancillary or pendent jurisdiction," citing, among other cases, *Hurn v. Oursler, supra.* After a review of the authorities applicable to the particular area of jurisdiction at bar, which, as the court noted, has analogies to pendent and ancillary

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> Pittsburgh & West Virginia Railway Co., D. C. W. D. Pa. 1958, 22 F. R. D. 252. A defendant may not play fast and loose with the judicial machinery and deceive the courts.

Id. See also Biggs, supra note 2. *Di Frischia* is commented upon in C. Wright, *Handbook of the Law of Federal Courts* § 8, at 18-19 (3d ed. 1976); Stephens, *Estoppel to Deny Federal Jurisdiction—Klee and Di Frischia Break Ground*, 68 Dick. L. Rev. 39 (1963); 15 U. Miami L. Rev. 315 (1961); 7 Utah L. Rev. 258 (1960).

jurisdiction, the court stated that the District Court had discretion in the premises and concluded in language equally applicable to the case before us:

> We need not rest our decision on any claim of judicial economy, for we are impressed that no opportunity for exercise of that discretion was accorded the District Court by motion to remand at the close of the federal facet of the case. That the District Court proceeded with the non-federal claims does not, in this instance, afford a ground for reversal: Failure of the appellants to bring to the attention of the court considerations requiring an exercise of discretion estops them from asserting that privilege after decision on the merits. [Citing cases.] To hold otherwise would encourage litigants to wager on their success on the merits, and if they lost, permit them to call the contest a nullity.[35]

In the case before us, the District Court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. Defendant Owen attacks the applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered.[36]

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35 351 F. 2d at 168.

36 *See* 6 *Wright & Miller* § 1444, at 234-237, and cases therein cited. In language that is strikingly applicable to the case at bar, Professors Wright and Miller state that "if there has been a substantial commitment of the court's or litigant's resources prior to the termination of the main claim, dismissal of the Rule 14 claim will run counter to the rationale justifying ancillary jurisdiction and third-party practice." *Id.* at 237. *See also Dery v. Wyer*, 265 F. 2d 804, 808 (2d Cir. 1959):

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But beyond that, however, there are other considerations. By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.[37]

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> Generally, in a diversity action, if jurisdictional prerequisites are satisfied when the suit is begun, subsequent events will not work an ouster of jurisdiction. [Citing cases.] This result is not attributable to any specific statute or to any language in the statutes which confer jurisdiction. It stems rather from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action. * * *
>
> Considerations of policy * * * accord with our conclusion.

37 Distinguished scholars have gone so far as to suggest, with respect to the dogma of "challenge jurisdiction any place any time" that we are becoming involved in mere "fetishism."

> If the record fails to disclose a basis for federal jurisdiction, the court not only will but must refuse to proceed further with the determination of the merits of the controversy unless the failure can be cured. This is true whether the case is at the trial stage or the appellate stage, and whether the defect is called to the court's attention "by suggestion of the parties or otherwise." Probably it would be possible to fill the rest of this book with citations and thumbnail abstracts of cases illustrating the application of this principle.
>
> This is established practice. Is it fetichism [sic]? Or is it grounded on solid considerations of policy and of legislative and j u d i c i a l statesmanship? Why

(Continued on following page)

But plaintiff overlooks the application of the *Gibbs* doctrine to ancillary litigation. The District Court had judicial *power* over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused

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> should not a party who has invoked federal jurisdiction, or failed seasonably to object to it, be held to have waived any defect, or be estopped from asserting it?

P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's *The Federal Courts and The Federal System* 835-36 (2d ed. 1973). Consider also the comments of the distinguished American Law Institute reflecting the disturbance, not only of distinguished scholars, but of many courts:

> At the present time and throughout the history of the federal judicial system, it has been possible for either party to raise, or for the court on its motion to consider, a question of jurisdiction over the subject matter at any stage in the course of litigation. *See, e. g., Mansfield, Coldwater & Lake Mich. Ry. v. Swan,* 111 U. S. 379 (1884). Even the party who has invoked jurisdiction may subsequently challenge it if the result of a trial on the merits is unfavorable. *See, e. g., American Fire and Cas. Co. v. Finn,* 341 U. S. 6 (1951). And a wily defendant may conceal a known jurisdictional defect until the period of the statute of limitations has run, then obtain dismissal, and achieve total immunity from suit. Some decisions indicate that he may even do this by controverting jurisdictional facts previously alleged or admitted. *E. g., Page v. Wright,* 116 F. 2d 449 (7th Cir. 1940) [*Ramsey v. Mellon Nat'l Bank & Trust Co.,* 350 F. 2d 874 (3d Cir. 1965)]. *But see Di Frischia v. New York Cent. R. R.,* 279 F. 2d 141 (3d Cir. 1960).
>
> As many commentators have noted, e. g., 1 *Moore Federal Practice* ¶ 0.60 (4) (2d ed. 1948), this fetish of federal jurisdiction is wholly inconsistent with sound judicial administration and can only serve to diminish respect for a system that tolerates it. Some effective limitation on the raising and consideration of jurisdictional issues seems long overdue.

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 366 (1969)

or not in its retention of the cause, defendant's conduct estops it from asserting abuse of discretion, not only under the teaching of *Murphy v. Kodz, supra,* but also under the most elementary considerations of judicial fairness. "Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered • • •."[38]

The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct.

Proceeding to the merits, the case was submitted to the jury under, among others, the following instruction:

> A plaintiff may proceed in a case under more than one theory of law. In this case, plaintiff alleges two theories, as subsequently explained, only one of which he need prove in order to recover:
>
> 1. That the crane supplied by defendant was unsafe for the purpose it was intended.
> 2. That the crane operator was in the employment of defendant and that defendant is therefore liable for the negligent acts of the crane operator.

There was no error in this instruction. It is well established that the trial court has the duty to submit to the jury all issues raised by the pleadings which have evidentiary support. *Flentie v. American Community Stores Corp.,* 389 F. 2d 80, 82 (8th Cir. 1968) (applying Iowa law); *Campbell v. Martin,* 257 Iowa 1247, 136 N. W. 2d 508, 511 (1965). In addition the court properly in-

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38 District Court Memorandum Opinion, quoted more fully at pp. 5-6, *supra.*

structed the jury on the establishment of negligence, causation, and damage.

Here there was ample and controverted evidence submitted on each of the theories of the plaintiff. The first issue presented by the court in its instructions related to the safe or unsafe condition of the crane concededly owned by defendant Owen. On this issue plaintiff's expert testified, as to described safety devices, that

> Well, with these safety devices available, I just don't think it is right to put a product out anywhere for rent or use for anybody unless it is equipped with it. You cannot assume, for example, that whoever it goes to are necessarily trained in safety and are going to take all the precautions and when a safety device is available and is being used in the industry, it is my opinion that these cranes and booms should be so equipped.

One of the issues most vigorously argued at trial was whether the crane operator, David Morrow, was a servant of Paxton or of defendant Owen, loaned by Paxton to Owen for this particular job. What the court was faced with was thus the notoriously complex "borrowed servant" problem,[39] that is, the problem of vicarious liability between the general employer, from whose employ the servant came, or the special employer, who was utilizing at

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39 "The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried."

Cardoza, *A Ministry of Justice*, 35 Harv. L. Rev. 113, 121 (1921).

the time the servant so obtained. On this issue, the trial court instructed the jury, essentially, that it must decide whether David Morrow was, at the time of the accident, acting as Owen's servant, and that the test of agency as between the general and the special employer was which had the right to control the manner of performance of the work being done. The evidence as to control, as well as other facets of the employment relation, was conflicting and presented a jury question. The instructions, read in their entirety in the light of the unique facts adduced as to Morrow's employment and duties, summarized *supra*, fairly presented the controlling issue to the jury and we find no error therein. *Bengford v. Carlem Corp.*, 156 N. W. 2d 855, 863 (Iowa 1968); *Houlahan v. Brockmeier*, 258 Iowa 1197, 141 N. W. 2d 545, 548 (1966); *Anderson v. Abramson*, 234 Iowa 792, 13 N. W. 2d 315 (19 4); *Kanipe v. Grundy County Rural Electric Co-op*, 231 Iowa 187, 300 N. W. 662, 665 (1941).[40]

We find no merit in the Workmen's Compensation issue as to Kroger. He was in no sense an employee of Owen, borrowed or direct.

Affirmed.

BRIGHT, Circuit Judge, dissenting.

Regretfully, I am unable to join in Judge Talbot Smith's opinion determining that the district court pos-

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40 Appellee relies also on *Nepstad v. Lambert*, 235 Minn. 1, 50 N. W. 2d 614 (1951), citing Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222 (1940), commented upon in 28 Ohio St. L. J. 550, 553-57 (1967).

sessed subject matter jurisdiction over the claims between Kroger and Owen Equipment & Erection Company.

Concededly, the defendant, Owen Equipment, although a Nebraska chartered corporation, maintains its principal business in Iowa, and is, therefore, an Iowa citizen. Congress made clear that for purposes of diversity jurisdiction, a corporation "shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U. S. C. § 1332 (c).

I do not believe that the holding in *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966), can be said to authorize the exercise of jurisdiction over a claim made by a plaintiff against an impleaded third-party defendant without diversity between the parties. In *Gibbs,* the district court already possessed subject matter jurisdiction over a federal claim between the two parties, so it was appropriate and within the federal court's judicial power to resolve a state claim appended to the federal claim. Here, the threshold question is whether ancillary jurisdiction supports Kroger's claim even though she has no claim against Owen with an independent jurisdictional basis.

I believe that the Supreme Court's pronouncements in *Aldinger v. Howard,* 427 U. S. 1 (1976), and cases such as *American Fire & Cas. Co. v. Finn,* 341 U. S. 6 (1951), require that we dismiss the case for want of jurisdiction.

Aldinger was an action brought under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983 against several county officials. The plaintiff attempted to join state law claims against the county itself arising out of the same facts

on a theory of pendent or ancillary jurisdiction. The Supreme Court rejected that attempt and with it the sort of reasoning found in the majority opinion.

In response to arguments that "pendent party" jurisdiction over a state law claim should be allowed even in the absence of another claim between the same parties with an independent jurisdictional base, the Court said:

> From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to *their* federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But *it is quite another thing to permit a plaintiff,* who has asserted a claim against one defendant with respect to which there is federal jurisdiction, *to implead an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction,* simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." [*Gibbs,* 383 U. S. at 725]. True, the same considerations of judicial economy would be served insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding. . . ." *Ibid.* But the addition of a completely new party would run counter to the well-established principle that federal court, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress. We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co. v. Fred Whitaker Co.,* 512 F. 2d 890, 894 (CA 4 1972):
>
> > "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assess-

> ing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."
>
> [427 U. S. at 14-15 (emphasis added).]

The situation is the same here. That the same facts may have been involved in Kroger's claim against Owen as those in Kroger's claim against the Omaha Public Power District is not by itself sufficient basis for ancillary or pendent jurisdiction over the claim against Owen. Had Kroger wished to sue both Owen and the Power District in a single forum, she could have done so in a state court. *See Fawvor v. Texaco, Inc.*, 546 F. 2d 636, 640-41, 643 (5th Cir. 1977). *Aldinger's reliance on Kenrose Mfg. Co. v. Fred Whitaker Co., supra,* 512 F. 2d 890, which also involved an attempt by a plaintiff in a diversity case to assert state law claims against a nondiverse third-party defendant is especially instructive.

The majority in distinguishing *Aldinger* fails to address the rationale for disclaiming federal jurisdiction presented in *Aldinger*:

> Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence. [*Id.* at 18.]

As *Aldinger* makes clear, 427 U. S. at 15-16, *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966), explicates the federal courts' power under article III in the face of congressional silence. *See also* Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 Colum. L. Rev. 127, 128-30, 140-42 (1977). *Gibbs* does not deal with the issue before

us, for here the Congress expressly limits by statute, 28 U. S. C. § 1332, the parties to which diversity jurisdiction extends.

Since *Strawbridge v. Curtiss*, 7 U. S. (3 Cranch) 267 (1806), it has been the rule that general diversity jurisdiction over a state law claim requires *complete* diversity between plaintiffs and defendants. The parties to this claim do not satisfy this requirement. Congress has commanded that diversity jurisdiction not extend to claims involving parties such as these. *See Fawvor v. Texaco, Inc., supra,* 546 F. 2d at 638-39; Comment, *supra,* 77 Colum. L. Rev. at 147.[41] As Judge Smith correctly observes, *supra* at 12 and 14 n. 25, citing *Fawvor v. Texaco, Inc., supra,* 546 F. 2d 636, and *Kenrose Mfg. Co. v. Fred Whitaker Co., supra,* 512 F. 2d 890, the majority of federal courts support the view that an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. It also appears that we are the first court of appeals to rule to the contrary. In

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41 A congressional intent to negate pendent jurisdiction cannot be inferred from the majority of jurisdictional statutes, which are intended as affirmative grants of jurisdiction only. Some jurisdictional statutes, however, evince a congressional decision that certain claims should not be heard in federal court. The federal question and diversity statutes, in particular, require that the claims exceed $10,000, and, in the diversity statute, that the parties be of diverse citizenship. The policies which called for the exclusion of claims not meeting these requirements also seem to demand that they not be heard through the exercise of pendent jurisdiction. Since Congress excluded these claims from federal jurisdiction, their adjudication through pendent jurisdiction seems clearly to frustrate congressional intent. [77 Colum. L. Rev. at 147 (footnotes omitted).]

addition to the cases cited by the majority, *see Saalfrank v. O'Daniel,* 533 F. 2d 325 (6th Cir.), *cert. denied sub nom. Saalfrank v. Parkview Mem. Hosp.,* 429 U. S. 922 (1976); *Rosario v. American Export-Isbrandtsen Lines, Inc.,* 531 F. 2d 1227, 1233 & n. 17 (3d Cir.), *cert. denied sub nom. Rosario v. United States,* 429 U. S. 857 (1976). Thus, I would conclude that Congress did not intend that federal courts take jurisdiction over a plaintiff's claim against a third-party defendant, in the absence of independent jurisdictional grounds.

I agree with Judge Smith's critical comments relating to Owen's concealment of the facts concerning diversity until well into the trial. However, it is well settled that a party cannot by his conduct be precluded through laches, waiver, or estoppel from raising a lack of federal subject matter jurisdiction. *See, e. g., American Fire & Cas. Co. v. Finn,* 341 U. S. 6 (1951) (party who removed case to federal court, and successfully resisted plaintiff's attempts to have it remanded, can raise want of jurisdiction after verdict for plaintiff); *Mitchell v. Maurer,* 293 U. S. 237 (1934) (party never raised lack of jurisdiction in any court); *Mansfield, C. & L. M. Ry. v. Swan,* 111 U. S. 379 (1884) (same as *Finn, supra*). That counsel for defendant played fast and loose with the court calls for sanctions by the court against the responsible parties, not the exercise of jurisdiction which the federal court does not otherwise possess. *See Mansfield, C. & L. M. Ry. v. Swan, supra,* 111 U. S. at 386-89; *Basso v. Utah Power & Light Co.,* 495 F. 2d 906, 910 (10th Cir. 1974); *Page v. Wright,* 116 F. 2d 449, 454-55 (7th Cir. 1940).

When a litigant's attorney has intentionally misled the court as to the jurisdictional facts and thus "sand-

bags" his opponent and the district judge, as appears to be the case here, the court possesses ample power to impose appropriate sanctions against the malefactor. Under somewhat similar circumstances, the Tenth Circuit dismissed the plaintiff's cause for lack of diversity, but directed that "all reasonable costs and expenses should be assessed against defendant including a reasonable attorney's fee on appeal." That court also noted the existence of a state "saving statute" which would permit the plaintiff to pursue a remedy in state court after the federal dismissal, despite the passage of the usual limitations period for the type of action involved. *Basso v. Utah Power & Light Co., supra,* 495 F. 2d at 910-11.

Similarly, I would remand this case to the district court with directions to dismiss the action for want of subject matter jurisdiction, leaving plaintiff free to pursue her remedy in the Iowa state courts.[42] Moreover, on remand, I would direct the district court to conduct a hearing relative to imposing sanctions against defendant or defendant's counsel, or both. If found appropriate, those sanctions may include all costs and expenses incurred by

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42 I do not agree with the district court's conclusion that if this action is dismissed for lack of jurisdiction, Kroger will be barred from all relief by the statute of limitations. Iowa Code Ann. § 614.10 (West), provides that

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

The facts of this case appear to bring it within this savings provision.

plaintiff, Geraldine Kroger, in pressing the action against Owen Equipment and may include a reasonable sum for attorneys' fees for services, pretrial, trial, and on this appeal.

In sum, while I disagree with the majority's disposition of this appeal, I emphatically agree that a drastic remedy is necessary to deter other litigants from engaging in concealment and delay in presenting known jurisdictional facts to the court by the party in possession of those facts in order to obtain an advantage in the conduct of litigation at the expense, not only of the opposing party, but of the court itself. Such conduct substantially hinders the proper and efficient administration of justice and wastes the time of judges, court personnel, and juries in the already overburdened federal courts. This dissenter suggests that such sanctions may be a more appropriate remedy for the abuse practiced in this case than opening the door to even more diversity cases than those already competing for judicial attention on the crowded dockets of the federal courts, particularly when state courts can dispose of all the state law claims involved in such cases. *See Ayoub v. Helm's Express, Inc.*, 300 F. Supp. 473 (W. D. Pa. 1969).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT

APPENDIX

The case was commenced by a complaint filed on November 24, 1972, by Geraldine Kroger, an Iowa citizen, administratrix of the estate of James D. Kroger, deceased, against the Omaha Public Power District (hereafter "OPPD"), a public corporation existing under the laws of the State of Nebraska, and having its principal place of business in Omaha, for negligence in the construction, maintenance, and operation of its power transmission line alleged to have been the proximate cause of plaintiff's decedent's death. The Paxton & Vierling Steel Company (hereafter "Paxton"), also a Nebraska corporation, was made a party defendant "for the sole and only purpose of determining its rights under the Workmen's Compensation Act, if any * * *." The parties agree that Paxton was dismissed out of this phase of the action, appellant stating, "because of a jurisdictional defect." The order with respect thereto is not found in the record before us. OPPD thereafter filed a third-party complaint against Paxton and "Owen Construction Co., Inc." (hereafter "Owen Construction"). Shortly thereafter, OPPD filed a motion for dismissal of Owen Construction, having ascertained that its proper corporate name was Owen Equipment and Erection Co. (hereafter "Owen Equipment"). The motion was granted and the court ordered that Owen Construction, "an Iowa corporation," be dismissed with prejudice and granted OPPD permission to file an "Amended Third-Party Complaint naming Owen Equipment and Erection Co., a Nebraska corporation, as an additional Third-Party Defendant * * *." OPPD's amended third-party complaint against Owen Equipment, "a Ne-

braska corporation," was subsequently filed. This is the Owen corporation remaining in the case.

Owen Equipment's answer to OPPD's amended third-party complaint stated as follows:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska.
2. Denies each and every other allegation contained in said Third-Party Complaint except those allegations which would be in the nature of admissions against the interest of the third-party plaintiff.

Plaintiff Kroger moved also for an order permitting her to add as a party defendant Owen Equipment, "a Nebraska corporation." Plaintiff filed such amended complaint against Owen Equipment, on November 9, 1973, describing it as "a Nebraska corporation with its principal place of business in Nebraska." Owen Equipment's answer thereto stated in pertinent part that it:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the Laws of the State of Nebraska.
2. Denies each and every other allegation contained in said Amended Complaint, except those allegations which would be in the nature of admissions against the interest of the plaintiff.

OPPD had moved for summary judgment on October 30, 1973. On September 9, 1975, this court affirmed the District Court's judgment in favor of OPPD against the plaintiff, dismissing OPPD, a Nebraska corporation, from the cause. *Kroger v. Omaha Public Power District,* 523 F. 2d 161 (8th Cir. 1975).

Shortly thereafter Owen Equipment's motion for summary judgment, which had been filed in September of 1974 was heard and denied by the court. This motion, by Owen Equipment, "a Nebraska Corporation," raised no issue of jurisdiction, made no point as to lack of diversity, nor did it make any mention of where Owen Equipment's principal place of business might be. The motion was denied on November 14, 1975, and trial commenced on January 12, 1976.

On January 13, 1976, during the trial, Owen Equipment filed an answer asserting that the court lacked subject matter jurisdiction, but failing to specify lack of diversity as the reason therefor. On January 14, 1976, after having raised lack of diversity, Owen Equipment moved for leave to file another amended answer which like the answer of January 13, asserted lack of subject matter jurisdiction but failed to specify lack of diversity. The court denied Owen Equipment's motion for leave to file an amended answer.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1976

76-1187

GERALDINE KROGER, ETC.,

Appellee,

vs.

OWEN EQUIPMENT & ERECTION CO., ETC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly divided Court.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 16, 1977

APPENDIX C

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS)

A F F I D A V I T

Affiant, being duly sworn on oath deposes and states as follows:

1. That he is an attorney associated with the law firm of Swarr, May, Smith & Andersen, 3535 Harney Street, Omaha, Nebraska. That said firm represents Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. (during the period of the latter's corporate existence) on a regular basis. That during 1972 and 1973 Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. were served with summons in a case in the United States District Court for the District of Nebraska entitled Geraldine Kroger v. Omaha Public Power District, case number 72-0-481. That defense of any claims made against the above two parties was immediately turned over to the parties' liability carrier. The carrier employed the law offices of Emil F. Sodoro to represent the parties.

2. That the undersigned saw to it that all information, documents and records of the parties requested by the carrier or its attorneys was provided. Other than providing such documents, being present at conferences, depositions of the employees of the parties, and at trial, our firm was not involved in the above-captioned litigation, nor familiar with the progression of said litigation.

3. On the morning of January 6, 1976, I was informed by Mr. David Johnson that trial was to commence at 1:30 P.M. of that day. During the noon hour of January 6, 1976, another lawyer in the firm and I were discussing the case in a conversational manner when he inquired of me what the basis of federal jurisdiction was and where Paxton & Vierling Steel Co.'s principal place of business was. He was interested in that he was in the process of commencing suit in federal court on the client's behalf. This conversation aroused my curiosity concerning the Kroger case. Upon my return to the office, I examined our firm file to determine whether plaintiff was an Iowa or Nebraska resident. I discovered plaintiff was an Iowa resident. I attempted to call Mr. Johnson but could not reach him.

4. Since someone from the firm had been asked by the client to observe the trial, I went to the courthouse that afternoon and arrived during voir dire examination. After selection of the jury, there was a recess. During the recess, I informed Mr. Johnson that it appeared to me that there was no jurisdiction because in my view Owen Equipment and Erection Co. had its principal place of business in Carter Lake, Iowa. Mr. Johnson stated that that fact had never occurred to him. I suggested he should apprise the court of that possibility. Mr. Johnson stated he would check it out first.

5. The following morning, I was present in Mr. Johnson's office prior to trial. Mr. Johnson was interviewing Mr. David Morrow. After the interview was completed, we again discussed the question of jurisdiction. Prior to leaving Mr. Johnson's office, we reviewed the pleadings and it appeared to us from the pleadings that there had never been complete diversity. Mr. Johnson instructed a law clerk to research the question and submit a brief to Mr. Johnson as quickly as possible.

Further Affiant saith not.

Robert J. Barber

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES DEC. 29, 1981 STATE OF NEBRASKA

Subscribed and sworn to before me this 29th day of June,

Julie A. Troshynski

STATE OF NEBRASKA)
) ss AFFIDAVIT
COUNTY OF DOUGLAS)

DAVID A. JOHNSON, of lawful age, being first duly sworn on oath, deposes and says:

1. That he is associated with the law firm of Emil F. Sodoro, P.C., the firm that represented Owen Equipment and Erection Company in this action. The litigation file was assigned to this affiant on or about November, 1973, and this affiant was actively involved as attorney for the said Owen from that time through trial.

2. This affiant has carefully reviewed the opinion of this court filed June 21, 1977, particularly in light of this court's finding that defendant engaged in "subtle and adroit pleading", that defendant "connived for himself an unfair advantage" and that the question of the citizenship of Owen had been "concealed" for some two years after the filing of the Amended Complaint. This affiant adamantly denies that any of the above findings by this court are true.

3. This affiant further states that he never engaged in any intentional concealment of the citizenship of Owen. That he is unaware of anyone associated or employed by defendant or any of defendant's representatives or anyone, for that matter, who intentionally concealed the citizenship of Owen at any time before trial.

4. This affiant is unaware of the issue ever being discussed, communicated, alluded to, or thought of by anyone until the second day of trial when Mr. Robert Becker, corporate counsel for Owen, mentioned the question to this affiant. This affiant had the question researched and upon affirmation that this was, in fact, a viable issue it was presented to the court during trial.

Further affiant saith not.

David A. Johnson

Subscribed and sworn to before me this 29th day of June, 1977.

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES APR. 24, 1978 STATE OF NEBRASKA

Julie A. Troshynski

APPENDIX

In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the Estate of JAMES D. KROGER, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 11, 1977

CERTIORARI GRANTED JANUARY 9, 1978

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

INDEX

INDEX—Continued

RELEVANT DOCKET ENTRIES

1972		
Nov 24	1.	Complaint.
1973		
Aug 24	17.	Defendant's Third Party Complaint.
Sep 7	20.	Voluntary Motion to Dismiss by Defendant and Third Party Plaintiff.
Sep 7	21.	Order that Third Party Defendant Owen Construction Co. is dismissed from action; Defendant and Third Party Plaintiff is granted permission to file Amended Third Party Complaint.
Sep 11	23.	Amended Third Party Complaint of O.P.P.D.
Sep 24	27.	Motion to Dismiss by Paxton & Vierling Co.
Sep 28	28.	Plaintiff's Motion for Order allowing Plaintiff to add Owen Equipment & Erection Co. as Party Defendant.
Oct 15	29.	Answer of Third Party Defendant Owen Equipment & Erection.
Oct 30	30.	Motion of Defendant and Third Party Plaintiff for Summary Judgment.
Nov 7	33.	Memorandum & Order that Paxton & Vierling's Motion to Dismiss is overruled; Plaintiff's Motion to add a party is granted; Plaintiff to have 10 days to file amended pleadings.
Nov 9	36.	Plaintiff's Amended Complaint.
Nov 27	41.	Defendant Owen Equipment & Erection Company's Answer to Amended Complaint.
Nov 27	42.	Defendant Paxton & Vierling Steel Co.'s Answers to Request for Admissions.

1974

May 23 57. Courtroom Minutes—Hearing on Third Party Defendant's Motion for Summary Judgment.

Jun 17 59. Defendant and Third Party Plaintiff's Interrogatories to Defendant and Third Party Defendant, Owen Equipment & Erection Company.

July 13 66. Third Party Defendant's Owen Equipment Co.'s Answers to Interrogatories.

Aug 23 67. Memorandum and Order.

Aug 23 68. Order that Defendant's Motion for Summary Judgment be granted.

Sep 4 69. Motion for Summary Judgment with request for oral argument by Defendant Owen Equipment & Erection Co.

1975

Feb 12 74. Order directing entry of final judgment dismissing Defendant Omaha Public Power District with determination of no reason to delay appeal.

Feb 12 75. Clerk's Judgment dismissing Defendant Omaha Public Power District with prejudice and with taxable costs against Plaintiff.

Oct 1 76. Certified copy of Judgment.

Oct 2 77. Order setting Oral Argument on Defendant's Motion for Summary Judgment for 10-10-75.

Oct 10 78. Courtroom Minutes.

Nov 14 81. Order that Motion for Summary Judgment is denied.

1976

Jan 12 84. Courtroom Minutes.

Jan 13 86. Answer of Defendant Owen Equipment & Erection Co.

Jan 13 87. Courtroom Minutes.

Jan 14 88. Courtroom Minutes.

Jan 15 89. Defendant's Motion to Strike.

Jan 15 90. Defendant's Motion for leave to file an Answer to Plaintiff's Amended Complaint.

Jan 15 91. Defendant's Motion for Dismissal or for Directed Verdict.

Jan 15 92. Defendant's Requested Instruction to the Jury.

Jan 16 94. Courtroom Minutes.

Jan 16 95. Jury Verdict for Plaintiff and against Defendant.

Jan 16 96. List of Witnesses.

Jan 19 98. Court's Charge to the Jury.

Jan 20 99. Judgment wherein it is ordered that Plaintiff recover of the Defendant the sum of $234,-756.00 and interest.

Jan 23 101. Memorandum

Jan 23 102. Order that Defendant's Motion to Dismiss is denied.

Jan 23 103. Defendant's Motion for Judgment n/o/v or for New Trial.

Jan 26 104. Defendant's Amended Motion for New Trial.

Feb 5 105. Defendant's Brief in Support of Motion for Judgment NOV and Motion for New Trial.

Feb 6 106. Memorandum.

Feb 6 107. Order that defendant's Motion for New Trial or Judgment n/o/v is denied.

Feb 26 108. Defendant's Notice of Appeal.

Feb 26 109. Defendant's Motion for Stay of Execution of

Judgment and Approval of Supersedeas Bond.

Feb 26 110. Order that amount of Supersedeas Bond be filed in the sum of $250,000.00, etc.

Feb 26 111. Defendant's Supersedeas Bond.

Feb 26 112. Defendant's Praecipe for Transcript of Proceedings.

Feb 26 113. Defendant's Praecipe for Record on Appeal, etc.

Feb 26 114. Defendant's Amended Notice of Appeal.

The opinion of the Court of Appeals is reported at 558 Fed. 2d 432 (8th Cir. 1977) and can be found in the Appendix to the Petition for Certiorari at App. pp. 1-36.

The Order Denying Petition for Rehearing En Banc by an evenly divided Court is unreported and appears in Appendix B to the Petition for Certiorari at App. p. 37.

COMPLAINT

(Filed November 24, 1972)

Plaintiff alleges:

I.

That she is a citizen and resident of Carter Lake, Pottawattamie County, Iowa, and that she was duly appointed as administratrix of the Estate of James D. Kroger, deceased, by the District Court in and for Pottawattamie County, Iowa; said appointment being duly made on October 25, 1972.

II.

That the defendant, Omaha Public Power District, a public corporation, is a public corporation organized and existing under the laws of the State of Nebraska and having its principal place of business in Omaha, Douglas County, Nebraska.

III.

That the defendant, Paxton & Vierling Steel Company, is a Nebraska corporation and is made a party defendant herein for the sole and only purpose of determining its rights under the Workmen's Compensation Act, if any, with respect to payments made under said Act to the plaintiff herein as next of kin of the deceased James D. Kroger.

IV.

That the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

V.

That on January 18, 1972, plaintiff's decedent was employed and working in the capacity of a machinist for the defendant, Paxton & Vierling Steel Company at its place of business in Carter Lake, Iowa, and as such was lawfully on the premises of the Paxton & Vierling Steel Company and in the vicinity of a high tension electric transmission line installed and maintained by the defendant, Omaha Public Power District in the course of its operation of an electric light and power distributing system and that said defendant, Omaha Public Power District, maintained a high tension electric transmission line across the premises of Paxton & Vierling Steel Company.

VI.

That at said date and place, plaintiff's decedent was working near a tank suspended by a cable attached to the boom of a crane and that as a result of the negligent maintenance and placement of the said high tension electric transmission line, said boom cable and tank became energized with electric current from said electric transmission line which resulted in a dangerous current of electricity of high voltage passing into and through the body of plaintiff's decedent and into the ground directly causing the death of plaintiff's decedent.

VII.

That the defendant, Omaha Public Power District, a public corporation, was negligent in the construction, maintenance and operation of said power transmission line in the following particulars:

(a) In not maintaining sufficient clearance between said lines and machinery reasonably expected to be operating in the vicinity of said lines.

(b) In not properly grounding and protecting said overhead lines.

(c) In not having said lines carrying said current properly insulated.

(d) In failing to warn plaintiff's decedent of the danger to which he was subjected.

(e) In failing to construct, maintain and operate said transmission lines in conformity with accepted standard of care and prudence observed in the industry and required by the laws of the State of Iowa.

(f) In allowing its highly dangerous product, to wit: high voltages of electricity, to escape and cause injury and death to plaintiff's decedent, in violation of and contrary to Section 489.16 of the Code of Laws of the State of Iowa.

VIII.

That the aforesaid negligence of Omaha Public Power District was the proximate cause of the death of plaintiff's decedent.

IX.

That plaintiff's decedent, at the time of his death, was 28 years of age with a life expectancy of 43.08 years, was earning and capable of earning in excess of $9,000.00 per year and was the sole support of plaintiff and four minor children.

X.

That prior to his death, plaintiff's decedent suffered extreme mental and physical pain and anguish because of the aforesaid negligence of defendant, Omaha Public Power District.

XI.

That the defendant, Omaha Public Power District had, prior to the electrocution of plaintiff's decedent, experienced other and many similar accidents in connection with uninsulated high voltage electric transmission lines throughout its system and knew for many years prior to January 18, 1972, that the continuance of said lines in said condition, in areas where persons could be expected to be injured thereby, was a dangerous and continuing practice and that the said defendant knowingly and willfully, wantonly, recklessly and grossly negligently disregarded the safety of others who might be expected to be injured or killed by such conduct and accordingly, in addition to the actual damages herein set out, plaintiff is entitled to an award of exemplary damages because of defendant, Omaha Public Power District's conduct aforesaid.

XII.

That by reason of the death of plaintiff's decedent, his said estate was damages in the amount of $750,000.00.

WHEREFORE, plaintiff demands judgment against the defendant, Omaha Public Power District, for $750,000.00 actual damages and $500,000.00 exemplary damages or an aggregate of $1,250,000.00, together with the costs of this action.

GERALDINE KROGER,
Administratrix of the Estate
of JAMES D. KROGER,
Deceased, Plaintiff

By: /s/ Warren C. Schrempp
SCHREMPP & BRUCKNER

1600 Woodmen Tower
Omaha, Nebraska 68102
Telephone (402) 341-1806
Attorneys for Plaintiff

THIRD PARTY COMPLAINT

(Filed August 24, 1973)

Comes now the Defendant and Third Party Plaintiff, Omaha Public Power District, and for its claim against the Third-Party Defendants, alleges and states as follows:

I.

Plaintiff, Geraldine Kroger, has filed against Defendant, Omaha Public Power District, a Complaint, a copy of which is attached hereto as "Exhibit A".

II.

The electrical power lines which Plaintiff alleges contributed to Plaintiff's decedent's death and injuries, were not owned, operated, or maintained by the Defendant and Third-Party Plaintiff, but were owned, operated and maintained by Third-Party Defendant, Paxton & Vierling Steel Co., which firm purchased said electrical power lines and all related poles, equipment and appurtenances on April 14, 1966. A true and correct copy of the bill of sale for said items is attached hereto as "Exhibit B".

By reason of said Third-Party Defendant's purchase of said electrical power lines, related equipment and appurtenances, any duty arising from the nature of their use or activities conducted in their vicinity, to maintain sufficient clearance, or otherwise protect, ground, or insulate such line, or to give warning as to their presence, or any other duty incident to the maintenance and ownership of said electrical power lines and apprutenances, falls solely

and entirely upon the owner and exclusive possessor of said electrical power lines and appurtenances, to wit, Third-Party Defendant, Paxton & Vierling Steel Company, and any liability arising out of a failure to operate or otherwise maintain said electrical power lines and appurtenances in a safe and careful manner in accordance with such duties is the sole responsibility and liability of Paxton & Vierling Steel Company.

III.

The alleged death and injuries of Plaintiff's decedent were solely and proximately caused by the negligence of Third-Party Defendant, Paxton & Vierling Steel Co., in the following particulars, to-wit:

(a) In failing to maintain sufficient clearance between said overhead electrical power lines and machinery reasonably expected to be operating in the vicinity of said power lines.

(b) In not properly grounding and protecting said overhead electrical power lines.

(c) In not having said overhead electrical power lines properly insulated.

(d) In failing to warn Plaintiff's decedent of the presence of said overhead electrical power lines.

(e) In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working, in the vicinity of said lines.

(f) In failing to notify Third-Party Plaintiff that machinery was being operated, and that men were working in the vicinity of said overhead electrical power lines.

(g) In failing to comply with and being in violation of Section 88.4 of the Code of Laws of the State of Iowa, and the Federal Occupational Safety and

Health Act, 29 U. S. C. § 666, and specifically 29 C. F. R. § 1910.180, promulgated pursuant to said Act, in that said Third-Party Defendant failed to furnish a safe place of employment to its employees, free from recognized hazards likely to cause death or serious physical harm to an employee.

(h) In failing to comply with and being in violation of 29 U. S. C. § 651 and 29 C. F. R. § 1910.180 (d) (4); § 1910.180 (j) (1), (2), (3), and (4); and 29 C. F. R. § 1910.176 (e), as promulgated pursuant to the Federal Occupational Safety and Health Act, in failing to de-energize the said overhead electrical power lines; in permitting a crane to be operated within ten feet of an overhead electrical power line rated at over 50 KV; in failing to have cage-type boom guards, insulating lines, or proximity warning devices, on a crane being operated near an overhead electrical power line; in failing to notify the Third-Party Plaintiff before operating a crane near an overhead electrical power line; and in failing to determine if the said line was de-energized.

IV.

The crane alleged in Plaintiff's Complaint, was owned by Third-Party Defendant, Owen Construction Co., Inc., and was in no way owned, operated or maintained by the Third-Party Plaintiff.

Any duty arising out of the use of said crane in the vicinity of the overhead electrical power line owned by Third-Party Defendant, Paxton & Vierling Steel Co., to maintain sufficient clearance, sufficient grounding, insulating and safety devices on said crane, to instruct the operator as to proper safety precautions when in the vicinity of electrical power lines, and to give warnings of the presence of such lines near said crane, fall solely and entirely upon the owner of the crane, to-wit, Third Party Defendant, Owen Construction Co., Inc., and any liability arising out of a failure to operate or otherwise safely maintain said crane in accordance with such duties is the sole responsibility and liability of Third-Party Defendant, Owen Construction Co., Inc.

V.

The alleged death and injuries of Plaintiff's decedent were proximately caused and contributed to by the negligence of Third-Party Defendant, Owen Constructtion Co., Inc., in the particulars set forth in Paragraphs III (d); (e); (f); (g); and (h) of this Third-Party Complaint, which particulars are made a part of this Paragraph to the same extent as if fully repeated herein.

VI.

Based upon the foregoing allegations Third-Party Defendants, Paxton & Vierling Steel Co. and Owen Construction Co., Inc., are jointly and severally liable to Third-Party Plaintiff for any and all sums which Plaintiff may recover from said Defendant and Third-Party Plaintiff on her Complaint.

WHEREFORE, Defendant and Third-Party Plaintiff, Omaha Public Power District, demands judgement, jointly and severally, against the Third-Party Defendants, Paxton & Vierling Steel Co., and Owen Construction Co., Inc., for all sums that may be adjudged against the said Defendant and Third-Party Plaintiff in favor of Plaintiff, Geraldine Kroger, and for all costs herein expended by said Third-Party Plaintiff.

OMAHA PUBLIC POWER
DISTRICT,
A Public Corporation,
Defendant and
Third-Party Plaintiff

By: /s/ Robert G. Fraser and
D. R. Busick
of FRASER, STRYKER,
MARSHALL & VEACH,
P. C.

500 Electric Building
(Phone 341-6101)
Omaha, Nebraska 68102

Its Attorneys

VOLUNTARY MOTION TO DISMISS

(Filed September 7, 1973)

Comes now the Defendant and Third-Party Plaintiff, Omaha Public Power District, and voluntarily moves the Court to dismiss its claim against Third-Party Defendant, Owen Construction Co., Inc., and to permit the said Defendant and Third-Party Plaintiff to file an amended Third-Party Complaint naming Owen Equipment and Erection Co., as a Third-Party Defendant, for the following reasons:

The Defendant and Third-Party Plaintiff's attorney was misinformed as to the name of the appropriate defendant, when the original Third-Party Complaint was prepared and filed herein. Based upon new information obtained by said attorney, it is now known that Owen Euipment and Erection Co., is the party which should have been named rather than Owen Construction Co., Inc., and the latter corporation is in no way involved in the present proceeding.

Accordingly, the Defendant and Third-Party Plaintiff, Omaha Public Power District, respectfully moves the Court for an order dismissing Owen Construction Co., from this action, and granting said Defendant and Third-Party Plaintiff leave to file an amended Third-Party Complaint

naming Owen Equipment and Erection Co., as an additional Third-Party Defendant.

Respectfully submitted,

OMAHA PUBLIC POWER
DISTRICT,
Defendant and Third-Party
Plaintiff,

By /s/ R. G. Fraser &
D. R. Busik
Of Fraser, Stryker, Marshall & Veach, P. C.

500 Electric Building
Omaha, Nebraska 68102

Its Attorneys

ORDER

(Filed September 7, 1973)

This matter comes before the Court upon the motion of Omaha Public Power District, Defendant and Third-Party Plaintiff, for an order permitting it to voluntarily dismiss its action against Owen Construction Co., Inc., an Iowa Corporation, and to file an Amended Third-Party Complaint naming Owen Equipment and Erection Co., a Nebraska corporation, as an additional third-party defendant. The Court being fully advised in these premises finds the motion should be sustained. Accordingly,

IT IS ORDERED that Third-Party Defendant, Owen Construction Co., Inc., an Iowa corporation, should be and is hereby dismissed from this action, with prejudice.

IT IS FURTHER ORDERED that the Defendant and Third-Party Plaintiff should be and is hereby granted permission to file an Amended Third-Party Complaint

naming Owen Equipment and Erection Co., a Nebraska corporation, as an additional Third-Party Defendant in this action.

Dated this 7th day of September, 1973.

BY THE COURT:

/s/ Robert V. Denney
United States District Judge

AMENDED THIRD PARTY COMPLAINT

(Filed September 11, 1973)

Comes now the Defendant and Third-Party Plaintiff, Omaha Public Power District, and for its claim against the Third-Party Defendants, alleges and states as follows:

I.

Plaintiff, Geraldine Kroger, has filed against Defendant, Omaha Public Power District, a Complaint, a copy of which is attached hereto as "Exhibit A".

II.

The electrical power lines which Plaintiff alleges contributed to Plaintiff's decedent's death and injuries, were not owned, operated, or maintained by the Defendant and Third-Party Plaintiff, but were owned, operated and maintained by Third-Party Defendant, Paxton & Vierling Steel Co., which firm purchased said electirical power lines and all related poles, equipment and appurtenances on April 14, 1966. A true nd correct copy of the bill of sale for said items is attached hereto as "Exhibit B".

By reason of said Third-Party Defendant's purchase of said electrical power lines, related equipment and appurtenances, any duty arising from the nature of their use or activities conducted in their vicinity, to maintain sufficient clearance, or otherwise protect, ground, or insulate

such line, or to give warning as to their presence, or any other duty incident to the maintenance and ownership of said electrical power lines and appurtenances, falls solely and entirely upon the owner and exclusive possessor of said electrical power lines and appurtenances, to-wit, Third-Party Defendant, Paxton & Vierling Steel Company, and any liability arising out of a failure to operate or otherwise maintain said electrical power lines and appurtenances in a safe and careful manner in accordance with such duties is the sole responsibility and liability of Paxton & Vierling Steel Company.

III.

The alleged death and injuries of Plaintiff's decedent were solely and proximately caused by the negligence of Third-Party Defendant, Paxton & Vierling Steel Co., in the following particulars, to-wit:

(a) In failing to maintain sufficient clearance between said overhead electrical power lines and machinery reasonably expected to be operating in the vicinity of said power lines.

(b) In not properly grounding and protecting said overhead electrical power lines.

(c) In not having said overhead electrical power lines properly insulated.

(d) In failing to warn Plaintiff's decedent of the presence of said overhead electrical power lines.

(e) In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working, in the vicinity of said lines.

(f) In failing to notify Third-Party Plaintiff that machinery was being operated, and that men were working in the vicinity of said overhead electrical power lines.

(g) In failing to comply with and being in violation of Section 88.4 of the Code of Laws of the State of Iowa, and the Federal Occupational Safety and Health Act, 29 U. S. C. § 666, and specifically 29 C. F. R. § 1910.180, promulgated pursuant to said Act, in that said Third-Party Defendant failed to furnish a safe place of employment to its employees, free from recognized hazards likely to cause death or serious physical harm to an employee.

(h) In failing to comply with and being in violation of 29 U. S. C. § 651 and 29 C. F. R. § 1910.180 (d) (4); § 1910.180 (j) (1), (2), (3); and (4); and 29 C. F. R. § 1910.176(e), as promulgated pursuant to the Federal Occupational Safety and Health Act, in failing to de-energize the said overhead electrical power lines; in permitting a crane to be operated within ten feet of an overhead electrical power line rated at over 50 KV; in failing to have cage-type boom guards, insulating lines, or proximity warning devices, on a crane being operated near an overhead electrical power line; in failing to notify the Third-Party Plaintiff before operating a crane near an overhead electrical power line; and in failing to determine if the said line was de-energized.

IV.

The crane alleged in Plaintiff's Complaint, was owned by Third-Party Defendant, Owen Equipment and Erection Co., a Nebraska corporation, and was in no way owned, operated or maintained by the Third-Party Plaintiff.

Any duty arising out of the use of said crane in the vicinity of the overhead electrical power line owned by Third-Party Defendant, Paxton & Vierling Steel Co., to maintain sufficient clearance, sufficient grounding, insulating and safety devices on said crane, to instruct the operator as to proper safety precautions when in the vicinity of electrical power lines, and to give warnings of the presence of such lines near said crane, falls solely and entirely upon the owner of the crane, to-wit, Third-Party Defendant, Owen Equipment and Erection Co., and any liability arising out of a failure to operate or otherwise safely maintain said crane in accordance with such duties is the sole responsibility and liability of Third-Party Defendant, Owen Equipment and Erection Co.

V.

The alleged death and injuries of Plaintiff's decedent were proximately caused and contributed to by the negligence of Third-Party Defendant, Owen Equipment and Erection Co., in the particulars set forth in Paragraphs III (d); (e); (f); (g); and (h) of this Amended Third-Party Complaint, which particulars are made a part of this Paragraph to the same extent as if fully repeated herein.

VI.

Based upon the foregoing allegations Third-Party Defendants, Paxton & Vierling Steel Co., and Owen Equipment and Erection Co., are jointly and severally liable to Third-Party Plaintiff for any and all sums which Plaintiff may recover from said Defendant and Third-Party Plaintiff on her Complaint.

WHEREFORE, Defendant and Third-Party Plaintiff, Omaha Public Power District, demands judgment, jointly and severally, against the Third-Party Defendants, Paxton & Vierling Steel Co., and Owen Equipment and Erection Co., for all sums that may be adjudged against the said Defendant and Third-Party Plaintiff in favor of Plaintiff, Geraldine Kroger, and for all costs herein expended by said Third-Party Plaintiff.

OMAHA PUBLIC POWER DISTRICT,
A Public Corporation,
Defendant and Third-Party Plaintiff

By /s/ R. G. Fraser &
D. R. Busick
Of Fraser, Stryker, Marshall &
Veach, P.C.
500 Electric Building
Omaha, Nebraska 68102
Its Attorneys

MOTION TO DISMISS BY
PAXTON & VIERLING STEEL CO.

(Filed September 24, 1973)

Comes now the third-party defendant, Paxton & Vierling Steel Co., a Nebraska corporation, and moves that the Third-Party Complaint be dismissed for the reason that it fails to state a claim upon which relief can be granted.

PAXTON & VIERLING
STEEL CO., A Nebraska
Corporation, Third-Party
Defendant,
By /s/ Ronald H. Stave
200 Century Professional
Plaza
7000 Spring Street
Omaha, Nebraska 68106
One of Its Attorneys

MOTION

(Filed September 28, 1973)

COMES NOW the plaintiff in the above entitled matter and pursuant to Rule 21 of the Federal Rules of Civil

Procedure, moves the Court for an order allowing the plaintiff to add as a party defendant Owen Equipment and Erection Co., a Nebraska Corporation.

GERALDINE KROGER,
Administratrix of the Estate of
JAMES D. KROGER, Deceased,
Plaintiff
By: /s/ Richard J. Dinsmore
SCHREMPP, BRUCKNER
& DINSMORE
1600 Woodmen Tower
Omaha, Nebraska 68102

ANSWER OF OWEN EQUIPMENT AND ERECTION COMPANY, THIRD-PARTY DEFENDANT

(Filed October 15, 1973)

Comes now the third-party defendant, Owen Equipment and Erection Company, and in answer to the Third-Party Complaint of Omaha Public Power District against it alleges, states and denies as follows:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska.

2. Denies each and every other allegation contained in said Third-Party Complaint except those allegations which would be in the nature of admissions against the interest of the third-party plaintiff.

WHEREFORE, having fully answered the Third-Party Complaint of Omaha Public Power District filed herein, this third-party defendant respectfully prays that said Third-Party Complaint be dismissed as to this third-party defendant and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND ERECTION COMPANY, A Corporation, Third-Party Defendant,

By: /s/ Ronald H. Stave

200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

MOTION FOR SUMMARY JUDGMENT

(Filed October 30, 1973)

Comes now the Defendant and Third-Party Plaintiff, Omaha Public Power District, and pursuant to Rule 56(a) of the Federal Rules of Civil Procedure moves the Court for an Order granting a summary judgment in favor of said movant on Plaintiff's Complaint, on the ground that there is no genuine issue as to any material fact, and said movant is entitled to a judgment as a matter of law.

In support of this motion, said Defendant relies upon the record herein, including all pleadings and answers to interrogatories, and such additional depositions or affidavits as may be introduced at the hearing on this motion.

OMAHA PUBLIC POWER DISTRICT, A Public Corporation, Defendant and Third-Party Plaintiff,

By /s/ D. R. Busick

Of Fraser, Stryker, Veach, Vaughn & Meusey,

500 Electric Building
Omaha, Nebraska 68102

MEMORANDUM AND ORDER

(Filed November 7, 1973)

Appearances:

For Plaintiff—Richard J. Dinsmore, of Omaha, Nebraska.

For Defendant and Third-Party Plaintiff—D. R. Busick, of Omaha, Nebraska.

For Third-Party Defendants—Ronald H. Stave, of Omaha, Nebraska.

This matter is before the Court on motion by third-party defendant, Paxton & Vierling, to dismiss [Filing No. 27] and plaintiff's motion to join a party [Filing No. 28].

In support of its motion to dismiss, Paxton & Vierling relies on *Mahue v. Iowa-Illinois Telephone Co.*, 279 F. Supp. 401, 403 (1967), which states:

> Under Iowa law which is applicable in this case wherein jurisdiction is based on diversity of citizenship, indemnity may be properly recovered against a concurrent tort-feasor when the claim for indemnity is founded upon (1) an express contract, (2) vicarious liability, (3) an independent duty running from the indemnitor to the indemnitee, or (4) active or primary negligence by the indemnitor as compared to passive or secondary negligence of the indemnitee. *Iowa Power and Light Co. v. Abild Construction Co.*, 144 N. W. 2d 303, (Ia. 1966) (citing cases). In *Abild*, the Iowa Supreme Court points out that of the four enumerated grounds for indemnification, the first three are based upon a relationship existing between the indemnitor and indemnitee. The fourth enumerated ground for indemnity (active or primary negligences v. passive or secondary negligence) is based only on common liability arising out of concurrent negligence (of different degrees) and is barred by the

> Iowa Workmen's Compensation Act, Iowa Code § 85.03, 85.20 (1962), in cases where the party from whom identification is sought has compensated the plaintiff under said act.

The Court agrees with Paxton & Vierling's statement of the law in this matter, but disagrees with the application of that law to the well pleaded allegations of the third party complaint. Paxton & Vierling has read the complaint too narrowly. The standard to be applied in ruling on a motion to dismiss a complaint for failure to state a cause of action is cited in 2A Moore's federal Practice ¶ 12.08, pp. 2271-2274, as follows:

> But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

Omaha Public Power District has alleged in Paragraph III, subparagraph (e), of its amended third-party complaint that Paxton & Vierling was negligent "In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working in the vicinity of said lines."

Also, in Paragraph III, subparagraphs (f) and (h), of the amended third-party complaint allegations of failure to notify Omaha Public Power District are made. Accepting these allegations as fact, if Omaha Public Power District can prove a corresponding duty to inform Omaha Public Power District by Paxton & Vierling, the right of indemnity would be established. "Indemnity is permissible when the right arises out of a separate duty due the third party from the employer." *Iowa Power and Light Co. v. Abild Construction Co.*, 144 N. W. 2d 303, 309.

Considering next plaintiff's motion to join a party, Rule 21 of the Federal Rules of Civil Procedure gives the Court broad discretion in dropping or adding parties. In

exercising that discretion in this case, the Court finds that plaintiff's motion should be granted.

IT IS THEREFORE ORDERED THAT:

1. Paxton & Vierling's motion to dismiss is overruled; and

2. Plaintiff's motion to add a party is granted. Plaintiff will have until ten (10) days from the date of this order to file amended pleadings adding Owen Equipment and Erection Co. as a party defendant.

Dated this 7th day of November, 1973.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

AMENDED COMPLAINT

(Filed November 9, 1973)

COMES NOW the plaintiff and for her Amended Complaint, alleges and states as follows:

I.

That she is a citizen and resident of Carter Lake, Pottawattamie County, Iowa and that she was duly appointed as administratrix of the Estate of James D. Kroger, deceased, by the District Court in and for Pottawattamie County, Iowa; said appointment being duly made on October 25, 1972.

II.

That the defendant, Omaha Public Power District, a public corporation, is a public corporation organized and existing under the laws of the State of Nebraska and having its principal place of business in Omaha, Douglas County, Nebraska; that the defendant, Owen Equipment

and Erection Co. is a Nebraska corporation with its principal place of business in Nebraska.

III.

That the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

IV.

That on January 18, 1972, plaintiff's decedent was employed and working in the capacity of a machinist for Paxton & Vierling Steel Company at its place of business in Carter Lake, Iowa, and as such was lawfully on the premises of the Paxton & Vierling Steel Company and in the vicinity of a high tension electric transmission line installed and maintained by the defendant, Omaha Public Power District in the course of its operation of an electric light and power distributing system and that said defendant, Omaha Public Power District, maintained a high tension electric transmission line across the premises of Paxton & Vierling Steel Company.

V.

That at said date and place, plaintiff's decedent was working near a tank suspended by a cable attached to the boom of a crane and that as a result of the negligent maintenance and placement of the said high tension electric transmission line, said boom cable and tank became energized with electric current from said electric transmission line which resulted in a dangerous current of electricity of high voltage passing into and through the body of plaintiff's decedent and into the ground directly causing the death of plaintiff's decedent.

VI.

That the defendant, Omaha Public Power District, a public corporation, was negligent in the construction, maintenance and operating of said power transmission line in the following particulars:

(a) In not maintaining sufficient clearance between said lines and machinery reasonably expected to be operating in the vicinity of said lines.

(b) In not properly grounding and protecting said overhead lines.

(c) In not having said lines carrying said current properly insulated.

(d) In failing to warn plaintiff's decedent of the danger to which he was subjected.

(e) In failing to construct, maintain and operate said transmission lines in conformity with accepted standards of care and prudence observed in the industry and required by the laws of the State of Iowa.

(f) In allowing its highly dangerous product, to-wit: high voltages of electricity, to escape and cause injury and death to plaintiff's decedent, in violation of and contrary to Section 489.16 of the Code of Laws of the State of Iowa.

VII.

That the crane was owned by the defendant, Owen Equipment and Erection Co.; that the defendant, Owen Equipment and Erection Co., was negligent and such negligence, together with the negligence of the defendant, Omaha Public Power District, as heretofore set forth, was the proximate cause of the death and injury of plaintiff's decedent in the following particulars, to-wit:

(a) In failing to warn plaintiff's decedent of the presence of said overhead electrical power lines.

(b) In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working, in the vicinity of said lines.

(c) In failing to notify Third-Party plaintiff that machinery was being operated, and that men were working in the vicinity of said overhead electrical power lines.

(d) In failing to comply with and being in violation of Section 88.4 of the Code of Laws of the State of Iowa, and the Federal Occupational Safety and Health Act, U. S. C. § 666, and specifically 29 C. F. R. § 1910.180, promulgated pursuant to said Act, in that said Third-Party defendant failed to furnish a safe place of employment to its employees, free from recognized hazards likely to cause death or serious physical harm to an employee.

(e) In failing to comply with and being in violation of 29 U. S. C. § 651 and 29 C. F. R. § 1910.180 (d) (4); § 1910.180 (j) (1), (2), (3) and (4); and 29 C. F. R. § 1910.176 (e), as promulgated pursuant to the Federal Occupational Safety and Health Act, in failing to de-energize the said overhead electrical power lines; in permitting a crane to be operated within ten feet of an overhead electrical power line rated at over 50 KV; in failing to have cage-type boom guards, insulating lines, or proximity warning devices on a crane being operated near an overhead electrical power line; in failing to notify the Third-Party plaintiff before operating a crane near an overhead electrical power line; and in failing to determine if the said line was de-energized.

Based upon the foregoing allegations, defendants, Omaha Public Power District and Owen Equipment and Erection Co., are jointly and severally liable to the plaintiff.

VIII.

That plaintiff's decedent, at the time of his death, was 28 years of age with a life expectancy of 43.08 years, was

earning and capable of earning in excess of $8,000.00 per year and was the sole support of plaintiff and four minor children.

IX.

That prior to his death, plaintiff's decedent suffered extreme mental and physical pain and anguish because of the aforesaid negligence of the defendants.

X.

That the defendants, Omaha Public Power District and Owen Equipment and Erection Co., had, prior to the electrocution of plaintiff's decedent, experienced other and many similar accidents in connection with uninsulated high voltage electric transmission lines throughout its system and knew for many years prior to January 18, 1972 that the continuance of said lines in said condition, in areas where persons could be expected to be injured thereby, was a dangerous and continuing practice and that the said defendants knowingly and willfully, wantonly, recklessly and grossly negligently disregarded the safety of others who might be expected to be injured or killed by such conduct and accordingly, in addition to the actual damages herein set out, plaintiff is entitled to an award of exemplary damages because of defendants, Omaha Public Power Di: ict's and Owen Equipment and Erection Co's conduct aforesaid.

XI.

That by reason of the death of plaintiff's decedent, his said estate was damaged in the amount of $750,000.00.

WHEREFORE, Plaintiff demands judgment against the defendants, and each of them, for $750,000.00 actual damages and $500,000.00 exemplary damages or an aggregate of $1,250,000.00, together with the costs of this action.

GERALDINE KROGER,
Administratrix of the Estate of
JAMES D. KROGER, Deceased,
Plaintiff

By: /s/ Richard J. Dinsmore

SCHREMPP, BRUCKNER
& DINSMORE

1600 Woodmen Tower
Omaha, Nebraska 68102

ANSWER TO AMENDED COMPLAINT

(Filed November 27, 1973)

Comes now the third-party defendant, Owen Equipment and Erection Company, and in Answer to the Amended Complaint of the plaintiff alleges, states and denies as follows:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the Laws of the State of Nebraska.

2. Denies each and every other allegation contained in said Amended Complaint, except those allegations which would be in the nature of admissions against the interest of the plaintiff.

WHEREFORE, having fully answered the Amended Complaint of the plaintiff, this third-party defendant respectfully prays that said Amended Complaint be dismissed as to this third-party defendant and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND
ERECTION COMPANY, A
Corporation, Third-Party
Defendant,

By /s/ David A. Johnson

200 Century Professional
Plaza

7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

ANSWERS TO REQUEST FOR ADMISSIONS

(Filed November 27, 1973)

Comes now the third-party deefndant, Paxton & Vierling Steel Co., a Nebraska Corporation, and for its Answers to the Request for Admissions of third-party plaintiff, Omaha Public Power District, states as follows:

1. Paxton & Vierling Steel Co., owns all of the electrical distribution equipment, fixtures and related wires and poles located on the premises of its steel plant at 423 Avenue "H", Carter Lake, Iowa.

ANSWER: Admitted.

2. Paxton & Vierling Steel Co., owns all of the property described in the Schedule of Material attached to Exhibit "B", a copy of which is attached hereto.

ANSWER: Admitted.

3. Exhibit "B", attached hereto, is a true and genuine copy of a bill of sale, whereby the Omaha Public Power District sold to Paxton & Vierling Steel Co. all of the electrical distribution equipment and fixtures described in the Schedule of Material attached to said exhibit, and that Paxton & Vierling Steel Co. acknowledged receipt of said material thereon on November 14, 1966.

ANSWER: Admitted.

4. The high tension electric transmission line referred to in Paragraph IV of plaintiff's Complaint was owned by Paxton & Vierling Steel Co., on January 18, 1972.

ANSWER: Admitted.

5. James D. Kroger, deceased, was employed by Paxton & Vierling Steel Co., on January 18, 1972.

ANSWER: Admitted.

6. Paxton & Vierling Steel Co. did not notify the Omaha Public Power District that a crane was being operated near the electrical transmission line referred to in Paragraph V of plaintiff's Complaint, on January 18, 1972, prior to the death of James D. Kroger.

ANSWER: Admitted.

7. Paxton & Vierling Steel Co. never requested the Omaha Public Power District to discontinue electrical transmission to its plant, located at 423 Avenue "H", Carter Lake, Iowa on January 18, 1972, prior to James D. Kroger's death.

ANSWER: Admitted.

8. The operator of the crane referred to in plaintiff's Complaint was an employee of Paxton & Vierling Steel Co.

ANSWER: Admitted.

PAXTON & VIERLING
STEEL CO., A Nebraska
Corporation, Third-Party
Defendant,

By: /s/ Lloyd L. Feller
Executive Vice-President

INTERROGATORIES

(Filed June 17, 1974)

To: Defendant and Third-Party Defendant, Owen Equipment and Erection Co., and its Attorney, David Johnson.

You are hereby notified to answer seperately and in writing, under oath, pursuant to Rule 33 of the Federal

Rules of Civil Procedure, within thirty (30) days of the date service is had upon you, the following interrogatories. You are further notified that these interrogatories are to be continuing, and should said Third-Party Defendant or its attorneys discover additional information as to matters inquired into in these interrogatories, between the time answers are made and the time of trial, supplemental answers shall be made informing the Third-Party Plaintiff and its attorneys as to any such information, duly discovered prior to trial.

1. Who owned the crane referred to in Plaintiff's complaint?

2. Who was operating the crane at the time of the accident alleged in Plaintiff's complaint and what is his present address?

3. Who was said operator employed by at the time of the accident?

4. Who is said operator employed by now?

5. Has said operator ever been employed by Owen Equipment and Erection Co.?

6. What kind of crane was involved in the accident alleged in Plaintiff's complaint?

7. Who manufactured the crane referred to in Plaintiff's complaint?

8. What year was said crane manufactured?

9. Was said crane equipped with a cage-type boom guard; insulating lines; proximity warning devices; or any other devices or equipment which would have either prevented electric current from traveling down the boom of the crane or would have warned the operator when the boom of the crane was in close proximity to an electrical transmission line?

10. Who maintained and serviced the crane?

11. Was the crane ever used at any location other than at Paxton & Vierling Steel Co., in Carter Lake, Iowa?

12. If the answer to Interrogatory No. 11 is affirmative, state each such location, the date or dates of use at each such location, and the name of the operator on each such occasion.

13. State the name of the liability insuraance carrier or carriers for Owen Equipment and Erection Co.

14. State the limits of the insurance coverage of each insurance policy owned by Owen Equipment and Erection Co., which may be applicable to this action?

OMAHA PUBLIC POWER DISTRICT,
A Public Corporation, Defendant and Third-Party Plaintiff,

By: /s/ D. R. Busick
Of Fraser, Stryker, Veach, Vaughn & Meusey, P.C.

500 Electric Building
Omaha, Nebraska 68102

Its Attorneys

ANSWERS TO INTERROGATORIES
(Filed July 13, 1974)

Comes now the third-party defendant, Owen Equipment and Erection Co., and for Answer to the Interrogatories propounded by defendant and third-party plaintiff, Omaha Public Power District, states as follows:

1. Who owned the crane referred to in plaintiff's complaint?

ANSWER: Owen Equipment and Erection Co.

2. Who was operating the crane at the time of the accident alleged in plaintiff's complaint and what is his present address?

ANSWER: David Morrow, 9607 Ohio Street, Omaha, Nebraska.

3. Who was said operator employed by at the time of the accident?

ANSWER: Paxton & Vierling Steel Co.

4. Who is said operator employed by now?

ANSWER: Paxton & Vierling Steel Co.

5. Has said operator ever been employed by Owen Equipment and Erection Co.?

ANSWER: Yes, Mr. Morrow has been employed by Owen Equipment and Erection Co. He was employed for that company for approximately two weeks from August 4, 1958 to August 16, 1958. An "oiler" is someone who works with a crane but does not operate it, and is sort of a handyman should something go wrong with the crane.

6. What kind of crane was involved in the accident alleged in plaintiff's complaint?

ANSWER: The records of Owen Equipment and Erection Co. reflect that the type of crane involved in the accident was a Lorain three-quarter yard crane, Model TL25, Serial No. 3980.

7. Who manufactured the crane referred to in plaintiff's complaint?

ANSWER: The records of Owen Equipment and Erection Co. would indicate that the manufacturer is Thew Shovel Company, Lorain, Ohio.

8. What year was said crane manufactured?

ANSWER: The records of Owen Equipment and Erection Co. would reflect that the crane was purchased in 1949; however, the actual date of manufacture is unknown to them.

9. Was said crane equipped with a cage-type boom guard; insulating lines; proximity warning devices; or any other devices or equipment which would have either prevented electric current from traveling down the boom of the crane or would have warned the operator when the boom of the crane was in close proximity to an electrical transmission line?

ANSWER: There were no such devices to our knowledge.

10. Who maintained and serviced the crane?

ANSWER: Everyday-type maintenance and service work on the crane was performed by David Morrow and Fred Kohler, Jr. However, any repairs needed to be done to the crane were performed by Missouri Valley Machinery Company.

11. Was the crane ever used at any location other than at Paxton & Vierling Steel Co., in Carter Lake, Iowa?

ANSWER: Yes.

12. If the answer to Interrogatory No. 11 is affirmative, state each such location, the date or dates of use at each such location, and the name of the operator on each such occasion.

ANSWER: In the first years when Owen Equipment and Erection Co. was active, a crane, not necessarily the crane in question, was used on numerous jobs outside of the present Paxton & Vierling Steel facilities. The last dated invoice of Owen Equipment and Erecetion Co. is dated December, 1963 for outside erection jobs. There is also an undated invoice for 1967; however, there were no cranes used outside of the Paxton & Vierling Steel Co.'s premises after 1967 as reflected by the records of this company.

13. State the name of the liability insurance carrier or carriers for Owen Equipment and Erection Co.

ANSWER: Great American Insurance Company.

14. State the limits of the insurance coverage of each insurance policy owned by Owen Equipment and Erection Co., which may be applicable to this action.

ANSWER: This information has been requested and will be furnished when this defendant is in receipt of same.

OWEN EQUIPMENT AND ERECTIO CO., a Nebraska Corporation, Defendant,

By: /s/ David A. Johnson

200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

MEMORANDUM AND ORDER

(Filed August 23, 1974)

This matter is before the Court on the motion by the defendant and third party plaintiff, Omaha Public Power District (hereafter referred to as OPPD), for summary judgment [Filing No. 30].

In support of its motion, the defendant, OPPD, cites several convincing cases which this Court believes accurately reflect the legal position of a producer and supplier of electricity which does not manifest the incidents of ownership, custody or control of the power lines in question. Due consideration having been given to all the pleadings filed in this case, the fruits of discovery, requests for admissions and the detailed depositions of individuals cognizant of all the elements of this incident, the Court is of the explicit opinion that there is not a significant substantial or genuine issue of fact as regards the alleged or potential liability of this sole defendant, OPPD.

The uncontroverted and abbreviated facts as regards this defendant expose a situation which denounces any liability on the part of OPPD. The Court is fully aware of the infrequent utilization of summary judgment in negligent actions. *Berry v. Atlantic Coast Line R. R.*, 273 F. 2d 572 (4th Cir. 1960). However, it finds in this case that reasonable men could not reach different conclusions

and inferences from the objectively developed and undisputed facts.

On January 18, 1972, the plaintiff's decedent was employed by Paxton & Vierling Steel Company and was working at its factory in Carter Lake, Iowa. While James Kroger was assisting in the movement of a large metal container suspended in the air by a crane, the crawler crane, while traversing across the premises of Paxton & Vierling Steel Company, contacted a high tension electric transmission line, owned and operated by Paxton & Vierling. The Court restrains itself exclusively to the negligence and duty which adheres in the Omaha Public Power District under the facts at this instant.

All the electrical distribution and transmission material and equipment on the premises of Paxton & Vierling's Carter Lake factory were owned by Paxton & Vierling at the time of this incident. OPPD did not have the obligation or duty to maintain these lines. Its sole relationship to Paxton & Vierling was the sale of electricity. Service calls made by OPPD at all times in response to requests of Paxton & Vierling were performed in the capacity of an independent contractor. At no time precedent to this incident did any individual or agent request OPPD to discontinue the flow of electricity to this factory on this day. OPPD was not advised nor put on notice that a crane crawler was being operated in the vicinity of these lines, nor was a service request made by Paxton & Vierling to OPPD to remove, raise or ground the subject power lines.

The plaintiff's claim against this defendant resides in the negligent maintenance and operation of specific transmission lines across the premises of Paxton & Vierling Steel Company. The crucial element in this allegation is the failure to show a possible breach of duty by OPPD to that class of individuals including this decedent, James Kroger.

OPINION

The pivotal fact in this case is the ownership and coincident responsibility for these specific powerlines. The Court is of the opinion that the lack of ownership and control of these lines demand that OPPD be severed from this action. 26 Am. Jur. 2d *Electricity, Gas and Steam* § 105, (1965), and cases cited therein. In most instances, a company which furnishes electric current for use in a system of poles, wires, or appliances owned and controlled by the purchaser of the power, is not under an obligation to inspect the carrying media before supplying the current and is not under a duty of continuing inspection while the current is being supplied. 26 Am. Jur. 2d *Electricity, Gas and Steam* § 106 (1966) and cases cited therein. *Merrit v. Tidewater Power Co.*, 205 N. C. 259, 171 S. E. 90 (1933); *Maynard v. Kentucky & West Virginia Power Co.*, 266 Ky. 295, 98 S. W. 2d 460 (1936).

The power lines in question were unequivocally sold to Paxton & Vierling Steel Company by OPPD in 1966. This Court notes the distinguishing characteristics in *Iowa Power & Light Co. v. Abild Construction Co.*, 144 N. W. 2d 303 (Iowa 1966), specifically on the burden and duty of "owning" an electrical distribution system and the inherent responsibilities thereof.

The Court acknowledges the plaintiff's contention that such a sale or transfer may be invalid or ultra vires. The Court recognizes, however, the overriding consideration that neither the custody and control of these lines resided in OPPD, nor did the title at the time of this incident. Paxton & Vierling admits ownership of these lines and the bill of sale was attached to the amended complaint. There is no merit in fact or law which supports the plaintiff's contention that the responsibility for these transmission lines still resided with OPPD. The failure of OPPD to obtain a franchise like that of the illegality of the contract under Iowa law is a matter strictly between the State of Iowa and OPPD; this failure does not enhance the position of the plaintiff because it is a defense

which, as a rule, cannot be invoked by a third party. *Armstrong v. Armstrong,* 192 Neb. 11, — N. W. 2d — (1974).

The case of *Berry v. Atlantic Coast Line Railroad, supra,* and the numerous decisions relying upon this foundational case dictate that summary judgment be granted to this defendant as a matter of law.

The undisputed facts reveal that the vertical distance between the wires and the ground was 33 feet. (Willis Long Deposition, 33:5-9). The requirement of Section 232 of the National Electric Safety Code requires a 20 feet clearance for this wire carrying 13,800 volts. (Willis Long Deposition, 15:7-9). This empirical fact meets the minimum requirement of the code. "It is difficult to conceive a better test of care than compliance with its provisions. *Smith v. Iowa Public Service Co.,* 233 Iowa 336, 6 N. W. 2d 123 (1942).

After being admonished about the danger of operating cranes near high voltage electrical lines (David Morrow Deposition, 177:13-18), the crane operator, an employee of Paxton & Vierling Steel Company, proceeded to raise the 60 foot boom upwards in the direction of the wires (Id., 185).

The *Berry* case is specifically dispositive on this point: "'. . . fraught with seemingly grave and obvious danger, while neglecting the equally practical alternatives which entailed no risk . . .'' (*Manaia v. Potomac Elec. Power Co.,* 4 Cir., 1959, 268 F. 2d 793, 798, cert. denied, 80 S. Ct. 255) was beyond the bounds of anything which the electric company might reasonably have anticipated." The Court also believes that this case dispels the plaintiff's remaining contentions based on OPPD's negligence due to the empirical fact that OPPD did not own these lines nor did it retain the incidents of ownership over these lines.

An order in compliance with this memorandum will be entered contemporaneously herewith.

Dated this 22nd day of August, 1974.

ORDER

(Filed August 23, 1974)

This matter comes before the Court on the motion of the defendant, Omaha Public Power District, for summary judgment. The Court finds that the defendant, OPPD, is not or was not chargeable with a duty owed to James Kroger for the persuasive reason that the control, ownership and responsibility for maintenance of these lines did not reside with the Omaha Public Power District. The plaintiff has failed to show that the defendant knew or reasonably could have known of a dangerous condition on the premises of Paxton & Vierling Steel Company.

IT IS THEREFORE ORDERED that this defendant, Omaha Public Power District, shall be granted its motion for summary judgment for the reasons stated in the memorandum filed contemporaneously herewith.

Dated this 22nd day of August, 1974.

BY THE COURT:

/s/ Robert V. Denney,
United States District Judge

MOTION FOR SUMMARY JUDGMENT

(Filed September 4, 1974)

Comes now the Defendant, Owen Equipment and Erection Co., a Nebraska Corporation, and pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure moves the Court for an Order granting a summary judgment in favor of this defendant on plaintiff's Amended Complaint on the grounds that there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law.

In support of this motion, this defendant relies upon the record herein, including all pleadings and answers to

interrogatories, and depositions taken of various witnesses or affidavits as may be introduced at the hearing on this motion.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106

One of Its Attorneys.

ORDER

(Filed February 12, 1975)

This matter comes before the Court pursuant to Rules 54 (b) and 60 (a) of the Federal Rules of Civil Procedure.

On August 23, 1974, an order of this Court was entered in the record of this case, granting Defendant, Omaha Public Power District's motion for summary judgment. It was the intent of this Court that said order be final and appealable, but it now appears that through clerical inadvertance and oversight said order was not in strict compliance with Rule 54 (b) of the Federal Rules of Civil Procedure, and that the Court now pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure finds the following order should be entered. Accordingly,

IT IS ORDERED AND DIRECTED that a final judgment should be entered, on a separate document, dismissing the Defendant, Omaha Public Power District, from this action, with prejudice, and that costs be taxed to Plaintiff.

IT IS FURTHER ORDERED that there is no just reason for delay of the entry of such final judgment as to

said Defendant, nor any just reason to delay an appeal of such judgment.

Dated this 11th day of February, 1975.

BY THE COURT:

/s/ Robert V. Denney,
United States District Judge

JUDGMENT

(Filed February 12, 1975)

This matter came on for hearing before the Court, Honorable Robert V. Denney, District Judge presiding, on the motion for summary judgment of Defendant, Omaha Public Power District, and the issues having been duly heard and considered, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff take nothing from the Defendant, Omaha Public Power District, that the action as to said Defendant be dismissed, with prejudice, on the merits, and that said Defendant recover of the Plaintiff its costs of the action.

Dated this 12th day of February, 1975.

/s/ Richard C. Peck,
Clerk of the Court

JUDGMENT

(Filed October 1, 1975)

Appeal from the United States District Court for the — District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the — District of Nebraska and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed:

September 9, 1975

Costs taxed in favor of Appellee:

Costs of printing 10 copies of Appellee's brief:	$221.51
Total costs of Appellee for recovery from Appellant in the U. S. District Court:	$221.51

Appellant's decedent was employed by Paxton & Vierling Steel Company at its factory in Carter Lake, Iowa. On January 18, 1972, decedent was involved in the movement of a large steel tank by means of a crane with a 60-foot boom. While one man drove the crane and another operated the boom, decedent walked along side the tank to steady it. During this maneuver, the boom came close enough to high-tension lines that electricity from those lines arced over to the boom. Another arc of electricity arced from the tank over to decedent and killed him.

Omaha Public Power District ["OPPD"], a public corporation of the state of Nebraska, had at one time owned the transmission lines involved. On November 14, 1966, however, OPPD sold the lines and equipment to Paxton & Vierling. OPPD thereafter sold electricity to Paxton & Vierling and when so requested made repairs upon the lines and equipment.

The District Court based its order of summary judgment on the fact that ownership of the transmission lines lay indisputably with Paxton & Vierling, that OPPD had no duty to maintain the lines, that OPPD had not been requested to discontinue the flow of electricity on the date of the accident and that OPPD had not been put on notice that a crane was being operated in the vicinity of the lines. As a result, there was no duty owed by OPPD to decedent, the breach of which would give rise to liability.

Summary judgment under Rule 56, Federal Rules of Civil Procedure, will not be granted unless "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." Rule 56 (c). Any inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion and should there be any reasonable doubt as to the existence of a genuine issue of a material fact, summary judgment must be denied. *Giordano v. Lee,* 434 F. 2d 1227 (8th Cir. 1970); *Clausen & Sons, Inc., v. Theo. Hamm Brewing Co.,* 395 F. 2d 388 (8th Cir. 1968); *Traylor v. Black, Sivalls & Bryson, Inc.,* 189 F. 2d 213 (8th Cir. 1951). Appellant cites *Williams v. Chick,* 373 F. 2d 330 (8th Cir. 1967), for the proposition that "a summary judgment does not provide a very satisfactory approach in tort cases." *Id.* at 332. Nonetheless, Rule 56 does not exclude tort claims, nor any other type of claims, from its provisions. While it is perhaps true that most tort cases would not be susceptible to a summary judgment, that is not to say that there are no claims sounding in tort which may be disposed of by means of a summary judgment.

A review of the applicable law leads this Court to the conclusion that the District Court was correct in granting summary judgment. *Cronk v. Iowa Power and Light Company,* 138 N. W. 2d 843 (Iowa 1966), sets forth the general law in this area:

> It is the duty of a person or corporation that maintains and controls wires or cables for the furnishing of electricity to others, to carefully and properly insulate their wires at all places where there is a likelihood or reasonable probability of human contact by persons who business or duty or rightful pursuit of mere diversion or pleasure brings them without contributory fault on their part into the zone of danger * * *.
>
> The law is well settled in this state that one furnishing electricity, while not an insurer, is held to the highest degree of care consistent with the conduct and operation of the business. The defendant had the

> duty to use reasonable care commensurate with the danger to prevent the escape of electricity from its line.

Id. at 847, 848. *See* also *Nelson v. Iowa-Illinois Gas and Electric Company,* 160 N. W. 2d 448 (Iowa 1968). In these cases however, there was no dispute as to the ownership of the lines; it lay with the power companies. In *LeCleve v. Iowa Electric Light and Power Co.,* 119 N. W. 2d 203 (Iowa 1963), the court refused to impose liability on the power company where the lines were privately owned and there was no showing of a duty to repair. In *Coleman v. Iowa Ry., Light & Power Co.,* 178 N. W. 365 (Iowa 1920), liability for wrongful death was placed on the power company even though the poles and lines belonged to decedent. The distinguishing factor was that liability was based on a breach of a duty of due care in the original construction of the lines and poles.

In the present case, ownership clearly lies with Paxton & Vierling. No claim is made that OPPD was negligent in the original construction of the lines. Liability, if any, must therefore be based on a breach of a duty to maintain or control the lines.

Iowa law is silent as to the conditions under which a non-owner will be said to have a duty to maintain or a right of control. Case law from other jurisdictions indicate that as a general rule a mere supplier of electricity cannot be held liable for injuries resulting from negligent maintenance of the lines and equipment. *White v. Orlando Utilities Comm'n,* 150 So. 2d 879 (Fla. App. 1963); *City of Decature v. Parham,* 109 So. 2d 692 (Ala. 1959); *Reichholdt v. Union Electric Co.,* 329 S. W. 2d 634 (Mo. 1959); *Hughes v. Louisiana Power & Light Co.,* 94 So. 2d 532 (La. App. 1956); *Louisville Gas & Electric Co. v. Johnson,* 282 S. W. 2d 138 (Ky. App. 1955); *Milligan v. Georgia Power Co.,* 22 S. E. 2d 662 (Ga. App. 1942). And the mere fact that the supplier was called in to make needed repairs does not impose a duty to maintain. *Bristol Gas & Electric Co. v. Deckard,* 110 F. 2d 66 (6th Cir. 1926);

Louisville Gas & Electric Co. v. Johnson, supra. Nor can it be said that OPPD had a right to control. To control means "to exercise restraining or directing influence over; to dominate; regulate • • • ." Webster's New International Dictionary (2d Ed. 1944). The facts show that OPPD did not hold such a position in relation to Paxton & Vierling's lines and equipment. The sale contract was absolute in its terms leaving OPPD without any incidence of control. The deposition of the president of Paxton & Vierling indicates that all control over the lines resided with Paxton & Vierling.

The facts also show clearly that OPPD did not know of the dangerous condition. OPPD was not told that a crane would be used near the power lines, nor were they requested to shut off the power. Under these circumstances there can be no liability for a failure to insulate the lines as appellant contends. Even the owner of transmission lines is not under an absolute duty to insulate. *Nelson v. Iowa-Illinois Gas and Electric Co., supra* at 452. *Cronk v. Iowa Power and Light Company, supra.* Such liability therefore cannot be imposed on a non-owner.

Appellant asserts that Ch. 489.16 of the Iowa Code creates a presumption in her favor. That section reads:

> In case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line in causing said injury but this presumption may be rebutted by proof.

Appellant contends that OPPD was operating the line and therefore the statutory presumption arises. It cannot be said, however, that a mere supplier of electricity operates the transmission lines within the meaning of that word. As used in the statute, operation implies a right of control or ownership over the l i n e s. Since OPPD neither owned nor controlled the lines, the presumption does not arise.

Appellant also states that OPPD did not comply with the laws of Iowa regulating the sale and distribution of

electricity. This assertion is irrelevant to the issue of whether OPPD owed a duty to decedent. In order for a violation of a statute to be evidence of negligence, it must be shown that statute was intended to create a duty of care owed to a class of persons of which decedent was a member. *Prosser, The Law of Torts,* § 36, p. 192 (4th ed. 1971). The Iowa statute regulating the sale and distribution of electricity is clearly not such a statute.

Liability for negligence cannot be imposed without first establishing that a duty was owed to decedent. *LeCleve v. Iowa Electric Power Co.,* 119 N. W. 2d 203 (Iowa 1963). As a matter of law, OPPD did not owe any duty to decedent under the circumstances of this case for the reason that OPPD did not own the transmission lines, nor did OPPD have a duty to maintain or a right of control over the lines involved.

For the foregoing reasons, judgment of the District Court is affirmed.

A true copy.

Attest: /s/ Robert C. Tucker
CLERK, U. S. COURT OF
APPEALS, EIGHTH
CIRCUIT.

ORDER

(Filed October 2, 1975)

This matter comes before the Court on motion of defendant (Filing No. 69) for summary judgment.

Pursuant to F. R. Civ. P. 56, this matter should be heard on oral argument.

IT IS THEREFORE ORDERED that defendant's motion come before the Court for oral argument at 9:30 A.M., on October 10, 1975, in Court Room No. 2, United States Post Office & Court House, Omaha, Nebraska.

Dated this 2nd day of October, 1975.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

ORDER

(Filed November 14, 1975)

This matter comes before the Court on motion of defendant, Owen Equipment and Erection Company (hereinafter Owen) for summary judgment (Filing No. 69).

Owen contends that it was merely the owner of the crane involved in the death of plaintiff's decedent, and that as an owner it is not liable, as a matter of law, for the negligent use of the crane by employees of Paxton & Vierling Steel Company. In essence, Owen denominates itself a bailor or lessor of the crane; however, the plaintiff has rebutted this contention by citations to deposition testimony wherein questions are raised concerning the employment status of the two crane operators, Kohler and Morrow.

A review of the depositions, affidavits and interrogatories convinces the Court that there is a genuine issue of fact as to whether Kohler and Morrow were employed by the defendant or whether the crane was leased to Paxton & Vierling.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is denied.

Dated this 17th day of November, 1975.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

ANSWER

(Filed January 13, 1976)

Comes now the defendant Owen Equipment and Erection Co., a Nebraska corporation, and for its Answer to the plaintiff's Amended Complaint admits, denies and alleges as follows:

I.

Defendant alleges that plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

II.

Defendant denies that the sum in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00. Defendant denies that this Court has jurisdiction over the subject matter of this action and of the parties, plaintiff and defendant.

III.

Defendant denies that it was guilty of negligence in any of the particulars as set forth in plaintiff's Amended Complaint.

IV.

Defendant further alleges that plaintiff's decedent was guilty of contributory negligence sufficient to bar his recover as a matter of law.

V.

Defendant further alleges that plaintiff's decedent assumed the risk.

VI.

Defendant denies all other allegations contained in plaintiff's Amended Complaint, except those allegations which constitute admissions against the interest of the plaintiff.

WHEREFORE, this defendant having fully answered the Amended Complaint of the plaintiff prays that the same be dismissed and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND ERECTION CO., A Nebraska Corporation, Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106

One of Its Attorneys.

MOTION

(Filed January 15, 1976)

Comes now the defendant, Owen Equipment and Erection Co., and moves the Court for an order striking from the record in this action the entire opinion testimony of plaintiff's alleged expert witness, Samuel McMinn, for the reason that the questions and answers relative to Mr. McMinn's opinion were beyond the pleadings alleged in plaintiff's Amended Complaint which questions were objected to by this defendant, said objections and each of them being incorporated in this Motion and made a part hereof as if fully set forth herein. The scope of the questions asked of Mr. McMinn in eliciting his opinion were outside the scope of the plaintiff's allegations of negligence, thus creating prejudice to this defendant, surprise, and substantial injustice.

In addition to incorporating into this Motion by reference defendant's objections made at the time of the testimony of this witness, defendant also incorporates the remarks in support of those objections as set forth in the transcript of testimony in full as if fully set forth herein.

OWEN EQUIPMENT AND EREC-
TION CO., Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106

One of Its Attorneys.

MOTION

(Filed January 15, 1976)

Comes now the defendant, Owen Equipment and Erection Co., and moves the Court for an order permitting this defendant to file an Answer to the plaintiff's Amended Complaint, the original of said Answer being attached to this Motion and made a part hereof.

The reasons submitted by defendant in support of this Motion have been orally set out in the record of this case at the time of trial before this Court.

OWEN EQUIPMENT AND EREC-
TION CO., Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

ANSWER

Comes now the defendant Owen Equipment and Erection Co., a Nebraska corporation, and for its Answer to the plaintiff's Amended Complaint admits, denies and alleges as follows:

I.

Defendant alleges that plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

II.

Defendant denies that the sum in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

III.

Defendant denies that this Court has jurisdiction over the subject matter of this action and of the parties, plaintiff and defendant.

IV.

Defendant denies that it was guilty of negligence in any of the particulars as set forth in plaintiff's Amended Complaint.

V.

Defendant further alleges that plaintiff's decedent was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

VI.

Defendant further alleges that plaintiff's decedent assumed the risk.

VII.

Defendant admits the allegation contained in plaintiff's Amended Complaint that Omaha Public Power District was negligent and that such negligence was the proximate cause of the injuries sustained by plaintiff's decedent.

VIII.

Defendant denies all other allegations contained in plaintiff's Amended Complaint, except those allegations which constitute admissions against the interest of the plaintiff.

WHEREFORE, this defendant having fully answered the Amended Complaint of the plaintiff prays that the same be dismissed and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

MOTION FOR DISMISSAL,
OR IN THE ALTERNATIVE,
MOTION FOR DIRECTED VERDICT

(Filed January 15, 1976)

Comes now the defendant and moves the Court for an order dismissing this case, or in the alternative, for an order directing the jury to return a verdict in favor of this defendant for the following good and sufficient reasons:

1. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted to plaintiff.

2. This Court does not have jurisdiction over the subject matter of this action, or over the parties plaintiff and defendant.

3. That the evidence introduced by plaintiff, together with all reasonable inferences to be drawn therefrom, is insufficient as a matter of law to make a prima facie case against this defendant.

4. That the evidence offered by plaintiff, together with all reasonable inferences which may be drawn therefrom, shows no act of negligence on the part of this defendant.

5. That the evidence offered by the plaintiff shows that the plaintiff's decedent was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

6. That the evidence offered by the plaintiff shows that the plaintiff's decedent assumed the risk and thus, plaintiff is precluded from recovering as a matter of law.

7. That there is no competent proof that the acts of this defendant were the proximate cause of the accident or of any of the plaintiff's alleged damages.

8. That there is no competent proof that plaintiff was damaged to any extent as alleged in her Amended Complaint.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

VERDICT

(Filed January 16, 1976)

We, the Jury, find in favor of the Plaintiff and assess damages at the sum of Two hundred thirty-four thousand, Seven hundred fifty-six Dollars ($234,756.00).

Dated this 16th day of January, 1976.

Paul Beilenberg
Foreman

JUDGMENT

(Filed January 20, 1976)

This action came on for trial before the Court, and jury, Honorable ROBERT V. DENNEY, Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED:

That the plaintiff, GERALDINE KROGER, recover of the defendant, OWEN EQUIPMENT & ERECTION COMPANY, the sum of TWO HUNDRED THIRTY FOUR THOUSAND SEVEN HUNDRED AND FIFTY SIX DOLLARS ($234,756.00), with interest thereon at the rate of eight per cent per annum as provided by law, and taxable costs of this action.

Dated at Omaha, Nebraska, this 20th day of January, 1975.

WILLIAM L. OLSON, Clerk

By /s/ Robert E. Zielinski,
Deputy Clerk

MEMORANDUM

(Filed January 23, 1976)

APPEARANCES:

For Plaintiff—Richard J. Linsmore, of Omaha, Nebraska.

For Defendant—David A. Johnson, of Omaha, Nebraska.

DENNEY, District Judge

This matter comes before the Court upon the motion of defendant to dismiss for lack of subject matter jurisdiction and other reasons. The motion was presented to the

Court for the first time during the trial of the case at plaintiff's evidence.

Originally, plaintiff brought this suit against Paxton & Vierling Steel Company and Omaha Public Power District ([OPPD]. Paxton & Vierling was subsequently dismissed from the suit. Thereafter, OPPD filed a cross-claim against Owens Equipment & Erection Company. Finally, plaintiff was granted leave of Court to assert a claim against Owens, the third-party defendant. Eventually, OPPD was dismissed from the suit and the only cause of action remaining was plaintiff's claim against the third party defendant, Owens.

Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defendant is incorporated in the State of Nebraska and has its principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. Hence, an independent basis of jurisdiction does not exist.

The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. *See Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Olson v. United States*, 38 F. R. D. 485 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.

> Properly read, *United Mine Workers* [*v. Gibbs*, 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i.e., all claims, state or federal, which derive from a common nucleus of operative facts . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27 [1], 14-569 to 14-570.

This case is nevertheless novel, in that the third party plaintiff was dsimissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this "pendent" claim.[1] Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. Despite the fact the defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction.

An Order is filed contemporaneously herewith, in accordance with the findings dilineated herein.

Dated this 22nd day of January, 1976.

ORDER

(Filed January 23, 1976)

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that defendant's motion to dismiss is denied.

Dated this 22nd day of January, 1976.

BY THE COURT

/s/ Robert V. Denney,
United States District Judge

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1 The Court is aware that "pendent jurisdiction" refers to state claims joined with federal claims and uses the term here in its ordinary context.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

(Filed January 23, 1976)

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Comes now the defendant Owen Equipment and Erection Co. and moves the Court, pursuant to Rule 50 of the Federal Rules of Civil Procedure, to have the jury verdict and judgment entered on said jury verdict set aside and to have judgment entered in accordance with this defendant's Motion for Dismissal or In the Alternative, Motion for Directed Verdict. This defendant sets forth the following good and sufficient reasons in support of this Motion.

1. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted to plaintiff.

2. This Court does not have the jurisdiction over the subject matter of this action, or over the parties plaintiff and defendant.

3. That the evidence introduced by plaintiff, together with all reasonable inferences to be drawn therefrom is insufficient as a matter of law to make a prima facie case against this defendant.

4. That the evidence offered by plaintiff, together with all reasonable inferences which may be drawn therefrom, shows no act of negligence on the part of this defendant.

5. That the evidence offered by the plaintiff shows that the plaintiff's decedent was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

6. That the evidence offered by the plaintiff shows that the plaintiff's decedent assumed the risk and thus, plaintiff is precluded from recovering as a matter of law.

7. That there is no competent proof that the acts of this defendant were the proximate cause of the accident or of any of the plaintiff's alleged damages.

8. That there is no competent proof that plaintiff was damaged to any extent as alleged in her Amended Complaint.

MOTION FOR NEW TRIAL

Comes now the defendant Owen Equipment and Erection Co., pursuant to Rule 50 of the Federal Rules of Civil Procedure, and in the alternative to the above requested Motion for Judgment Nothwithstanding the Verdict, moves the Court for an Order setting aside the jury verdict and judgment entered thereon and granting a new trial to this defendant for the following good and sufficient reasons.

1. The verdict and judgment are contrary to law.

2. The verdict and judment are contrary to the evidence.

3. The Court erred in sustaining objections of plaintiff to evidence offered for and on behalf of the defendant.

4. The Court erred in overruling the objections of defendant to evidence offered for and on behalf of the plaintiff.

5. The Court erred in giving Paragraph No. 5 of Instruction No. 5.

6. The Court erred in giving Instruction No. 7.

7. The Court erred in giving Instruction No. 8.

8. The Court erred in giving Instruction No. 9.

9. The Court erred in giving Instruction No. 12.

10. The Court erred in giving Instruction No. 13.

11. The Court erred in giving Instruction No. 14.

12. The Court erred in giving Instruction No. 16.

13. The Court erred in instructing the jury in all of said instructions in such a manner as to give undue weight to plaintiff's evidence.

14. The Court erred in refusing to sustain defendant's Motion for Dismissal or in the alternative, for a directed verdict at the close of plaintiff's evidence.

15. The Court erred in failing and refusing to give each of the defendant's requested instructions.

16. Irregularities in the proceedings of the Court by which the defendant was prevented from having a fair trial.

17. The defendant was prevented from having a fair and impartial trial because of abuses and discretions by the trial court.

18. There were errors of law occurring at the trial and duly excepted to by this defendant.

19. The verdict rendered by the jury is excessive and appears to have been given under the influence of passion or prejudice.

20. That the cumulative effect of all the above and foregoing errors prejudiced the defendant and prevented it from having a fair trial.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation,
Defendant

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

ORAL ARGUMENT REQUESTED

Defendant respectfully requests that oral argument be granted on the above Motion.

AMENDED MOTION FOR NEW TRIAL

(Filed January 26, 1976)

Comes now the defendant Owen Equipment and Erection Co. and amends its prior Motion for New Trial and specifically reserves all other objections and errors of law referred to in the original Motion for New Trial, to-wit:

1. The Court erred in giving Instruction No. 15.

2. Defendant withdraws Paragraph 10 in its original Motion for New Trial relating to the alleged error by the Court and in giving Instruction No. 13.

3. The Court erred in giving any instruction relating to liability of this defendant on the basis of any agency relationship between the crane operator, David Morrow, and this defendant.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

MEMORANDUM

(Filed February 6, 1976)

DENNEY, District Judge

This matter comes before the Court upon the motion of defendant for judgment notwithstanding the verdict or, in the alternative, for new trial [Filings No. 103, 104]. The Court shall ignore counsel's irrational, inflammatory language in his supporting brief directed as his misconception of judicial impropriety and shall address the legal issues

raised. Counsel's request for oral argument before this Court on said motions is denied.

Defendant take vehement exception to this Court's denying its motion to dismiss. Defendant asserts that the Court acted in contravention of direct Eight Circuit precedent, citing *United States v. Lushbough,* 200 F. 2d 717 (8th Cir. 1952). Defendant should read this Court's Memorandum carefully. The Court based its decision on *United Mine Workers of America v. Gibbs,* 393 U. S. 715 (1966), which was decided long after *Lushbough.* Likewise, defendant's exception to this Court's comments concerning defendant's long silence on the jurisdictional issue is the result of failure to comprehend the Court's holding. This Court held that retention of ancillary jurisdiction is discretionary with the trial court. The untimeliness of defendant's motion is unquestionably relevant to the exercise of discretion. Furthermore, with regard to defendant's assertion that this Court is following a bare minority rule, the Court requests counsel to read Professor Moore's *Federal Practice*:

> In the first edition of this treatise the view was taken that if, as permitted under the Rule, plaintiff A. B. amended his complaint to state a claim against the third-party defendant E. F., independent grounds of jurisdiction would be required to support plaintiff's claim against E. F.
>
> . . .
>
> The Supreme Court decision in *United Mine Workers v. Gibbs* calls for reexamination of the majority view . . . [footnotes omitted,] § 14.27[1] at 14-565, 568.

The Court also directs counsel's attention to *Morgan v. Serro Travel Trailer Co., Inc.,* (U. S. D. C. Kan., Dec. 30, 1975), 44 L. W. 2334, in which Judge Rogers, in a detailed discussion, arrived at the same conclusion this Court did, based on *United Mine Workers.*

Furthermore, it is fundamental that once the main claim falls out, provided there was subject matter jurisdiction

over that claim, the Court may, in its discretion, retain jurisdiction over the ancillary claim. In *Federal Prescription Service, Inc. v. Amalgamated Meat Cutters and Butchers Workmen of America et al.,* Slip No. 74-1451, 1469 (8th Cir., Dec. 18, 1975), the Eighth Circuit upheld a trial court's retention of a pendant claim in which the trial judge actually found that the main claim "lacked substance and was filed mainly to give this court jurisdiction over the pendent count." Slip Opinion at 22.

Obviously, the question is not without difficulty. However, the law is not stagnant. Trial courts must make new law in the absence of direct precedence, and this Court conscientiously applied its sense of justice to this case.

Defendant also takes exception to the Court's instructions on master-servant. Defendant asserts that there was no evidence of any control exercised by Owen over Morrow. However, the test is not control, but the right to control, as defendant itself recognizes in citing *Houlihan v. Brockmeir,* 258 Ia. 1197, 141 N. W. 2d 545 (1967). Certainly there was sufficient evidence of the right to control as evidenced by testimony concerning Supervisor Harry Flynn.

In addition, defendant now raises the assertion that it has carefully examined the authority in the State of Iowa relating to the elements necessary for the creation of a borrowed servant "and finds cases at odds with this Court's instructions." The Court would have greatly appreciated this discovery prior to its instructing the jury. Counsel cannot raise this objection in a post-judgment motion, not having presented the objection on these grounds *prior* to instructing the jury. Furthermore, the defendant did not suffer prejudice in consideration of the instruction on "servant of two masters."

Defendant also takes exception to the verdict on the basis that it circumvents workmen's compensation laws. This, perhaps, also would have been a persuasive argument if presented properly to the Court in a pre-trial motion.

Defendant objects to the Court's failure to give each of its requested instructions. Local Rule 27 provides that "[as] far as practicable and unless otherwise ordered, each party shall submit to the judge and serve on all other parties any requested instructions on or before the opening day of trial. Additional requested instructions relating to matters arising during the trial may be submitted and served at any time prior to the conclusion of the testimony." On or about December 17, 1975, the parties received written notice that this case appeared second on the January, 1976, trial list. Defendant's failure to submit requested instructions until after the close of the evidence is not only contravention of the local rule, but is also inexcusable.

Defendant objects strongly to the Court's instructing on agency because plaintiff did not plead this theory of recovery. It is fundamental that pleadings lose their significance when a case is tried. Where justice requires, pleadings shall be amended to conform to the evidence. A defendant may not sit by and allow evidence to be admitted without objection and later be heard to claim prejudice. Only during the opening statement by plaintiff did defendant object to plaintiff's agency theory as improper argument and not pleaded. The Court sustained the objection on the basis of improper argument. When evidence was offered on the ageny relationship, defendant never objected.

Even in the event defendant did object, the Court would have admitted the evidence in the interests of justice. Defendant's claim of prejudice flies in the face of reality. Defendant certainly knew that plaintiff intended to try this matter on an agency theory when it moved for summary judgment. Summary judgment was denied November 14, 1975, because plaintiff's brief raised a "genuine issue of fact as to whether Kohler and Morrow were employed by the defendant . . ." [Filing No. 81].

The Court has reviewed the file and proceedings in this matter and concludes that the evidence was sufficient and defendant suffered no prejudicial error emanting from the Court.

An Order is filed contemporaneously herewith in accordance with this Memorandum.

Dated this 6th day of February, 1976.

ORDER

(Filed February 6, 1976)

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that defendant's motion for new trial or judgment notwithstanding the verdict is denied.

Dated this 6th day of February, 1976.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

NOTICE OF APPEAL

(Filed February 26, 1976)

Notice is hereby given that Owen Equipment and Erection Co., defendant above named, hereby appeals to the United States Court of Appeal for the Eighth Circuit from the final judgment and order entered in this action on the 6th day of February, 1976.

OWEN EQUIPMENT AND EREC-
TION CO., A Nebraska Corporation,
Defendant

By /s/ David A. Johnson

200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

AMENDED
NOTICE OF APPEAL

(Filed February 26, 1976)

Notice is hereby given that Owen Equipment and Erection Co., defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on January 20, 1976 and from the Order overruling Motion for New Trial entered on February 6, 1976.

OWEN EQUIPMENT AND EREC-
TION CO., a Nebraska Corporation.
Defendant

By /s/ Michael P. Cavel
of The Law Offices of Emil F. Sodoro, P. C.

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106.

One of Its Attorneys.

PARTIAL TRANSCRIPT OF PROCEEDINGS
[Page 1] MORNING SESSION

January 13, 1976
10:42 a. m.

THE COURT: Is there anything to be brought up before we bring in the jury?

MR. DINSMORE: No, Your Honor.

THE COUURT: All right, you may bring in the jury.

(Jury Present)

THE COURT: You may call your first witness.

MR. DINSMORE: Your Honor, the plaintiff will call Mr. Fred Kohler.

FRED H. KOHLER

called as a witness on behalf of the plaintiff, having been first duly sworn testified as follows:

Direct Examination

BY MR. DINSMORE:

Q. Would you state your name for the record, please?

A. I beg your pardon?

Q. State your name for the record, please, sir.

A. Fred H. Kohler.

Q. Mr. Kohler, the acoustics are awfully bad in [Page 2] here and I will try to speak loudly and if you don't hear me, just say you don't understand or say you don't hear me, will you do that?

A. All right.

Q. And where do you live, sir?

A. 2817 South 19th, Omaha.

Q. That is here in Omaha, Nebrask?

A. Yes, sir.

Q. All right, and what is your job, sir?

A. Machine shop foreman, Paxton and Vierling Steel.

Q. And you are a machine shop foreman there, and would you tell us what your duties are there as a machine shop foreman?

A. To supervise the operations there in the machine shop and maintenance in some cases, help with maintenance.

Q. And so you are sort of over the men who are machinists, would that be a fair statement?

A. Yes, sir.

Q. And how long have had that duty and responsibility down there at Paxton and Vierling?

A. About five years.

Q. Mr. Kohler, you were in the courtroom this morning while the opening statements were being made by the attorneys, is that correct?

A. Yes, sir.

[Page 3] Q. You have had an opportunity, I assume prior to today to talk with the attorneys and your deposition has been taken previously, is that correct, sir?

A. Yes, sir.

Q. And you know we are here about the death of Mr. James Kroger?

A. Yes.

Q. Back in January of 1972?

A. Yes, sir.

Q. So, were you called upon that day to assist in the operation of a crane?

A. Yes.

Q. All right, and if you would just tell us what kind of crane it was and a little bit the crane and how it was operated?

A. It is a Lorraine motor crane. It is mounted on a truck, rubber wheels, and it has a sixty-foot boom on it or did at the time and it is used primarily for lifting.

Q. Is this one of the cranes that we see around a construction area or is there anything different?

A. It is similar.

Q. There is nothing different than the way we see them around a construction site, is that correct?

A. It is similar to those, yes.

[Page 4] Q. And reference has been made to its as a twenty-five ton?

A. Yes.

Q. All right. Now on the day in question back in January of 1972, do you know, sir, who owned that crane?

A. Owen Erection and Equipment.

Q. Did you know that in January of 1972?

A. I have known it—yes.

Q. Sir, do you remember back on June 3rd of 1974, Mr. Johnson and myself came out to the plant area and took your deposition?

A. Yes, sir.

Q. And do you remember that Mr. Jack Fitch, Court Reporter, was there much like Mrs. Casper here is taking down the testimony?

A. Yes.

Q. And at that time you swore to tell the truth?

A. Yes.

Q. Just as the Judge swore you in today?

A. Yes, sir.

Q. Do you remember at that time sir, on page 60, line 10, I asked this question, and this was in June of 1974, question by me:

"QUESTION: Do you know who owned that crane?"

"ANSWER: No, I don't. I don't know for sure who [Page 5] owns it. I would assume Paxton and Vierling did but I couldn't say for sure."

"QUESTION: You don't know one way or the other?"

"ANSWER: No."

"QUESTION: Do you know now?"

"ANSWER: No."

Q. Do you remember at that time I asked you those questions and you made those answers at that time, sir?

A. Well, I could probably say the same thing right now. I could not prove that Owen E and E owns the crane right now. I assume that they do or I think that they do. I am sure that they do.

Q. Has that been—

A. (Interrupting) But I don't have—I wouldn't have any way of proving who owned it myself.

Q. But, uh, is what you are telling us now what you understand since the time of your deposition?

A. Not particularly; I would suppose, I suppose I might have formed that conclusion since then but at the time, as I said, I said I did not know for sure. That is probably the case.

Q. But there is no question that you did make those answers to those questions, is that correct, sir?

A. No doubt.

Q. I want to visit with you for a few minutes, sir, [Page 6] as to the facts as to how Mr. Kroger was killed. Approximately what time of day was it when you were asked to assist in the operation of the crane?

A. Shortly after the lunch hour.

Q. All right, and I know that this is a two-man operation, is it not, to run the crane itself?

A. Yes.

Q. All right, would you explain what the two men do?

A. Well, in this particular operation, one part of the crane is—one would drive the truck and the one would run the dragline itself.

Q. All right, is there anything in the operation of it this day, is there any way that you then—excuse me. Were you operating the truck part?

Q. And Mr. David Morrow was operating the crane part or dragline part?

A. Yes.

Q. On this day in question, the day Mr. Kroger was killed, could you see Mr. Morrow and could he see you and could you communicate between one another?

A. No, I could—from where I was sitting in the truck, I could not see Dave unless I would turn around and look at him. I could see him if I turned [Page 7] around, yes.

Q. But you would not normally when you were driving the truck turn around and look at him?

A. Well, no.

Q. And what about as far as — well I will try to — did you operate the truck from the time it was first moved or hooked up to the tank until it came in contact with the overhead wires?

A. No.

Q. All right, tell the ladies and gentlemen of the jury just what the setup was or how that came about?

A. The operator, Mr. Morrow, put the crane in position near the tank in its original position, and then he came and got Mr. Kroger and myself. We went out and hooked the tank up. Mr. Morrow picket it up and put the boom out over the front of the machine in near horizontal position, and he drove the truck himself, and Mr. Kroger and I walked along and steadied the tank, keeping it from moving around too much as we moved over there to the location where we intended to raise it up.

Q. All right, and so it was Mr. Morrow who drove it underneath the lines, is that correct?

A. Right.

Q. All right just to orient yourself, sir, if [Page 8] that way to the front of the courtroom or to the back of the courtroom however you want to describe it is north and

that way would be east (indicating) and behind you is south and off to your left is west, what general direction were you going?

A. West.

Q. All right, did there come a point in time—excuse me. I will withdraw that. The boom was out horizontal to the ground, was it not, sir?

A. Yes, sir.

Q. Do you know what angle it was at?

A. Very little of an angle.

Q. Pretty much perpendicular to the ground?

A. Yes.

Q. Or, excuse me, parallel?

A. Horizontal to the—

Q. Parallel (indicating)?

A. Yes.

Q. And the tank was attached to it from the dragline down.

A. Yes.

Q. Approximately how far was the tank off of the ground, if you can recall?

A. Two or three feet.

Q. And then you reached a point in time where [Page 9] you were over these power lines, is that correct?

A. Under it.

Q. Excuse me, under the power lines, is that correct?

A. Yes.

Q. And then you took over the truck operation part of it?

A. Yes.

Q. And then would you tell me what happened?

A. Well—

Q. Could you go any further west?

A. Yes, yes. As the boom started raising a little at a time, I tried to move forward. I did move forward.

Q. Excuse me, the point I wanted to make was was there a building obstructing you to the west?

A. Yes.

Q. So there was a building in front of you?

A. Yes.

Q. And the overhead lines above you?

A. Right.

Q. And approximately how far were the lines off the ground?

A. Thirty to thirty-five feet.

Q. And it was a sixty-foot boom, was it not?

A. Yes.

[Page 10] Q. And the building was in front of you so you couldn't go any further west, is that right?

A. Yes.

Q. And so what was the intended purpose, sir? Were you trying to do—what were you trying to do as far as booming-up so that you could—

A. (Interrupting) To avoid getting too close to the wires, by booming the machine up, and moving the truck ahead, eventually you would succeed in getting the boom on the other side of the wires in a position high enough to pick this tank up and put it where it belonged.

Q. You were not operating the crane part, though, were you?

A. No, sir.

Q. At any time did you see an arcing between the overhead lines and the boom, arcing of electricity?

A. No.

Q. At any time did you see, sir, an arcing from the tank to where Mr. Kroger was?

A. Yes.

Q. At any time during this operation was Mr. Kroger touching the tank at all?

A. No.

Q. How far was he from the tank, from your [Page 11] observation, sir?

A. He could have been two to four feet, or six feet.

Q. It was not a matter of inches, in any event?

A. No, sir.

Q. Sir, as the boom was going up, do you know what the angle of the boom was?

A. No, no I don't.

Q. Do you know what a boom indicator is, sir?

A. Yes.

Q. Or angle indicator, is that sometimes called an angle indicator?

A. Yes.

Q. And what is that?

A. It is a device in the machine that tells the angle of the boom in relation to the ground as it is raised, it moves.

Q. Did this crane have a boom indicator on it?

A. I really don't know. If I had to guess, I would say it did not, but I am not positive.

Q. Is the function of a boom indicator so the operator can see whether he was within safe limits as far as raising the boom?

MR. JOHNSON: I object to the form of the question.

[Page 12] THE COURT: I think it calls for a conclusion. You can ask him, "What is the purpose of the boom indicator as far as your experience is concerned?"

Q. (By Mr. Dinsmore) All right, sir, what is the function of a boom indicator and why is it on cranes?

A. I think it is to keep the operator from getting the boom high enough so it could tip over backwards. I would guess that is what its function is. I am not a crane operator. I really don't know that either, but I would guess it is so that the operator would know what angle that boom is on, and after a certain point, it becomes dangerous if it is too straight, I would guess.

Q. Or coming into proximity to wires?

A. Not necessarily. I think it would be—I think that angle indicator is not primarily for that reason, no.

Q. So, again when your deposition was taken back in June of 1974, page 86:

"QUESTION: You did not have a boom indicator on that crane that day, did you sir?"

"ANSWER: No, we put one on, but I think it was after that accident happened."

"QUESTION: What is the function of a boom indicator?"

[Page 13] "ANSWER: So the operator can see whether he is within his safe limits as far as raising the boom or not, to know approximately what angle he is on and so forth."

Do you remember me asking you those questions at that time, sir?

A. Yes.

Q. Do you recall giving those answers back in June of 1974?

A. Well, I can't remember that far back but I probably did answer just like that.

Q. Sir, you just made mentioned that you are not a crane operator, is that correct?

A. Yes.

Q. Do you belong to any unions that are engaged in the operation of heavy machinery, specifically cranes?

A. No, sir.

Q. Have you ever been?

A. No, sir.

Q. And is the operation of this crane—this is a two-man operation, is it not?

A. Yes, sir. At certain times, depending on what it is being used for.

Q. And on this day, it was a two-man operation, was it not?

[Page 14] A. Yes, yes.

Q. And there is one of the two men chosen to operate the crane?

A. Yes, sir.

Q. Now, who was Mr. Harry Flynn?

A. Harry Flynn, I believe worked for Owen Erection and Equipment. He was an erection superintendent some years back.

Q. All right, he was an employee of Owen Equipment and Erection Company, does that seem correct to you?

A. That I could not swear to. I assume he was.

Q. And he would go out on jobs, would he not, outside the plant?

A. Yes.

Q. Did Mr. Flynn ever instruct you to go to outside jobs?

A. I don't recall any specific jobs I ever went out of the plant on. I may have just driven a truck not as an operator or something, but I may possibly have driven the truck outside, but I cannot recall any specific occasions.

Q. When you say the truck, do you mean the truck part of the crane?

A. Yes, sir.

Q. Well, when you would go on outside jobs, would [Page 15] you consider Mr. Flynn your supervisor?

MR. JOHNSON: I object to the question. It does not properly reflect Mr. Kohler's testimony. He said he could not remember for sure. It calls for hearsay. It calls for a legal conclusion. There is no timeframe as to whether we are talking about the day of the accident or twenty years ago or when we are talking about.

THE COURT: Sustained.

Q. (By Mr. Dinsmore) I suppose I have to ask you: Did you ever go on any outside jobs outside of the Paxton and Vierling plant with Harry Flynn who was the construction superintendent for Owen Equipment and Erection Company, sir, in years past at any time?

A. If I went out on a job where he was, it was probably with the machine or maybe just to take it to a job and back or something like that. I never did work with him as my supervisor directly.

Q. Back in June of 1974, when we took your deposition out at the plant, you swore to tell the truth then?

A. Yes sir.

Q. And Mr. Johnson was there?

A. Yes, sir.

Q. And I asked you, page 84, line six:

"QUESTION: And before that what about Mr. Flynn, [Page 16] did Mr. Flynn ever do that?"

"ANSWER: Yes, if I was working on a job and he was in charge of it."

"QUESTION: Was that primarily outside stuff?"

"ANSWER: Yes."

"QUESTION: With Mr. Flynn?"

"ANSWER: Or the others, all the outside stuff was a lot of years back and it was not too frequent."

"QUESTION: Did you consider Mr. Flynn one of your supervisors?"

"ANSWER: Depending on the time, yes. He was at different times. I would consider him my supervisor, yes, sir."

Do you remember me asking you those questions back in June of 1974, Mr. Kohler?

A. I don't remember you asking me questions. I don't remember back that far, but if they are in that record, I probably answered them that way.

Q. You don't have any dispute that the Court Reporter took them down wrong or anything?

A. No, no.

Q. So you did consider Mr. Flynn one of your supervisors then, didn't you?

A. No, sir. Not directly, I have to clarify that. I would respect him as somebody in an official capacity [Page 17] but not absolutely my supervisor because I was working for Paxton and Vierling Steel and if I was sent any place it was by somebody there.

Q. Sir, are you at variance then with what you told us before when you said, "Depending on the time, yes. He was at different times. I would consider him my supervisor, yes, sir."?

A. Now what is your question now, please?

Q. Are you at variance then with that former statement you made before?

A. No. Because it could be interpreted—however you want it—I mean that is the way I look at it.

Q. Sir, was it your responsibility or did anyone ever instruct you from Owen Equipment and Erection Company or Paxton and Vierling Steel Company that you were to have the responsibility to see that the crane complied with the safety rules and regulations?

MR. JOHNSON: Just a moment, I object to the question.

THE COURT: It is just asking for "yes or no".

THE WITNESS: Could I have the question again, please?

Q. (By Mr. Dinsmore) Yes, my question basically, sir, was whether anyone from Owen Equipment and Erection Company or from Paxton and Vierling ever instructed you [Page 18] that you were to be in charge of the safety rules and regulations concerning the crane?

A. No, no.

Q. That was not your duty?

A. No, sir.

Q. Do you know whose duty it was?

A. No, I don't really know.

Q. In the operation of a crane, sir, are there devices called proximity warning devices?

A. I have heard of them.

Q. Are they devices that can tell you whether or not you are getting close to electrical transmission lines?

A. I presume so.

Q. Did this crane from Owen Equipment and Erection Company have such a device on it?

A. Not to my knowledge.

Q. Mr. Kohler, were you then as far as you know the only witness as to the arcing of electricity passing into Mr. Kroger?

A. Yes, I think so.

Q. And were you the first one to him sir?

A. Yes.

Q. Did he die instantaneously, sir?

A. No, I don't think he died instantaneously.

Q. Excuse me—I didn't mean to interrupt you. [Page 19] I was just going to ask you what his condition was when you first arrived?

A. Well, on that, he was laying on the ground and he had labored breathing. I would say like semiconscious.

Q. Was he evidencing any pain or moaning?

A. Yes, he—yes, he was.

Q. Did he say anything to you?

A. He said, "Help me."

Q. Did you send for the first aid man or the rescue squad?

A. Yes.

MR. DINSMORE: You may examine.

Cross-Examination

BY MR. JOHNSON:

Q. Mr. Kohler, as I understand your testimony, Mr. David Morrow came into the shop area where you were that day and asked you to come out and help him move that crane, is that how it was?

A. Yes.

Q. Had he previously been sent out by you to get the crane and get it ready or by someone else?

A. By one of the supervisors, he had been sent out.

Q. Who was that?

[Page 20] A. I think it was Clem, Clem Rosemary.

Q. Is he an employee of Paxton and Vierling?

A. Yes.

Q. Was he on that day?

A. Yes.

Q. Mr. Morrow then came back in and told you he had the crane ready or something to that effect?

A. Yes, sir.

Q. And so was it you then that got Mr. Kroger or said something to Mr. Kroger to the effect that "Let's you and I go out now and help him"?

A. That is right.

Q. Was Mr. Kroger under your supervision at that time at Paxton and Vierling?

A. Yes, sir.

Q. What was his job?

A. He was a machine operator.

Q. Pursuant to your statement to him, then, the two of you along with Mr. Morrow walked out of the machine shop area to the yard itself, is that correct?

A. That is right.

Q. And the crane was out there and the crane was in the vicinity of this airtank, is that right?

A. Yes, yes.

Q. Mr. Dinsmore has asked you to assume there are [Page 21] certain directions here and unless I am mis-

taken I think he asked you to assume the same directions here in the courtroom that I asked the ladies and gentlemen in the opening statement to assume?

A. Yes.

Q. And that is where they are sitting is the general location of where the tank was going to be placed?

A. Right.

Q. And the way I am pointing now would be west?

A. Yes, sir.

Q. And to your right would be east, is that right?

A. Yes.

Q. And then south (indicating) and north (indicating) behind you and behind me respectively?

A. Yes, yes.

Q. And where I am sitting then here in the courtroom just for the purposes of illustration, Mr. Kohler, were there some buildings or was there a building that ran pretty much in an easterly and westerly direction?

A. Yes.

Q. And is that generally the building or the vicinity of where the machine shop was where you were located?

[Page 22] A. Yes.

Q. You and Mr. Kroger?

A. Yes.

Q. And then did you walk out of a door that would be on the south side into the yard itself?

A. Yes.

Q. The yard being the area more or less right here in in front of all of us here in the courtroom, is that right?

A. Yes, yes.

Q. And the crane then would be down along toward your right? Or as to the ladies and gentlemen of the jury, to their front, is that right?

A. Yes.

Q. Which direction was the crane facing, the boom itself, when you went out, do you remember that off-hand?

A. I think it was facing south.

Q. In relation to these buildings then that ran east and west, where was the airtank initially sitting?

A. It would be on the south, the south end of the yard.

Q. And the south end of the yard then would be pretty much in the area where you are, so to speak, [Page 23] in the courtroom for purposes of illustration?

A. Yes.

Q. And is there a fence with barbed wire on it that runs east and west?

A. Yes.

Q. Along the lot line of the Paxton and Vierling property?

A. Yes.

Q. And that tank was located close to that fence then, is that right?

A. Yes.

Q. It was hooked up then?

A. When Dave came in and got Jim and me, we hooked it up, the three of us, or Jim and I, and then we proceeded from there.

Q. What was used to hook the tank up?

A. Chains.

Q. Were the chains wrapped around the tank in some fashion?

A. Yes.

Q. On each end?

A. Yes.

Q. With a loop in the middle?

A. Yes.

Q. And then the hook on the cable itself is hooked [Page 24] to the middle part of the chain?

A. Yes.

Q. And then the tank is lifted in the air?

A. Yes.

Q. By Mr. Morrow?

A. Yes, sir.

Q. And then did he get down to the truck part of the crane itself and then start moving it on in a westerly direction?

A. Yes.

Q. And so the crane then would be moving with the tank in the air toward the ladies and gentlemen of the jury, is that correct?

A. That is right.

Q. You and Mr. Kroger were standing on the ground initially and then walking along beside this tank, is that right?

A. Yes, sir.

Q. And you had the building on the north side of you and the fence on the south?

A. Yes.

Q. And then the building that you were going to was on the west, is that right?

A. That is right.

Q. Was there any other way, any other route, that [Page 25] you could have taken that day to get this tank to the location where you were taking it?

A. No, sir.

Q. You were aware of the fact that there were high tension wires over you, is that right?

A. Yes, sir.

Q. Where were you walking in relation to the tank, on the south side of the tank or on the north part of the tank as you were walking along?

A. I believe I was on the south side.

Q. Was Mr. Kroger on the north then?

A. Yes.

Q. As you proceeded underneath the wires did the boom in effect come up very close to the building itself, is that why you had to stop?

A. That is right.

Q. And if you went any further, the boom would go right into the building itself?

A. If you would go any further, the boom and the load would be too close.

Q. Too close to the building?

A. Yes.

Q. And at that time then, as I understand your testimony, Mr. Kohler, Mr. Morrow got out of the truck part of the crane and moved back to the control department, [Page 26] is that right?

A. Yes, sir.

Q. Where the controls and levers are to work the boom?

A. Yes.

Q. Did you then get into the truck part?

A. Yes, I did.

Q. What was your intention then as far as what you were doing or what he was doing in relation to placing this tank someplace?

A. We intended to drive ahead and boom-up a little at a time until we were far enough past the wires to be safe, and also have it up high enough to finish setting this tank where it belonged.

Q. Let's go back for just a minute and let me ask you: At any point in time from the time you and Mr. Kroger walked out of the shop until the time you were down in the position we just talked about next to the building, did you ever have a conversation or make a statement to Mr. Kroger about what you were going to do and what his job was?

A. Yes, I think we all three discussed this while we were hooking the tank up.

Q. And what part did you play in this discussion or conversation as far as statements to Mr. Kroger as to what he was doing that day?

A. I can't really exactly remember any exact words that I said to him. I probably warned him about these wires.

MR. DINSMORE: I am going to have to object to this. He cannot recall and he is paraphrasing and it is hearsay.

THE COURT: It is not hearsay, but unless you can recall the substance of what you said, then you can't testify to it.

THE WITNESS: Okay then, I won't answer that question.

Q. (By Mr. Johnson) Mr. Kohler, as I understand your testimony you said you could not recall the exact words?

A. That is right.

Q. Do you recall in any way the substance of what you said in any way to Mr. Kroger that day without getting

into the exact words, do you recall the substance of what you told him?

A. I said something in regards to watching the tank to make sure that it did not swing around or get out of control. That much I can remember saying.

Q. Do you remember the substance of anything else other than that?

[Page 28] A. No.

Q. All right, when you got the crane down to the position that we last talked about, that is with the boom right up against the building, and at the time that you got or walked from the ground up into the truck part of the crane itself, did you see where Mr. Kroger was standing?

A. He was—he moved down to the side near to the tank and like six feet away from it.

Q. Which direction was he facing in relation to the crane itself at that time?

A. He was facing the crane and the tank and me and Dave, of course.

Q. So in effect if I understand what you are saying then, at the time you got off of the truck part of the crane, you were first of all facing the tank itself and looking in effect at Mr. Kroger, is that right?

A. Yes.

Q. And would he be standing then somewhere down in the—

A. (Interrupting) Right about this position (indicating) yes.

Q. Over to the right of the ladies and gentlemen of the jury looking at or at least in the direction of the crane itself where you were and the tank, is that correct?

[Page 29] A. Yes.

Q. Do you recall now how many times that the boom was moved up and the truck moved forward kind of in sequence?

A. It had moved a couple of short distances like a foot or two at a time but I could not really say exactly how many times the boom was raised a little and the load dropped and so forth.

Q. It was at least one or two and possibly could have been more than that, is that right?

A. Yes.

Q. At the time that you saw this arcing between the tank and Mr. Kroger, had the boom itself been moved to the right at all, do you recall that?

A. No.

Q. It was still pretty much facing in a westerly direction?

A. Yes.

Q. And it had just been moving up, is that right?

A. Yes.

Q. Well, from the time that Mr. Kroger moved over to that position where he was standing facing the crane until the time of the accident, did he ever change positions that you saw?

A. No, he just stood there more or less in the

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[Page 116] January 13, 1976
3:05 p.m.

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: Mr. Dinsmore, you may proceed.

MR. DINSMORE: Thank you, Your Honor. Your Honor and ladies and gentlemen of the jury, at this time, I

would offer as admissions against interest from the deposition previously taken of Mr. Edward F. Owen.

THE COURT: Who is not available for trial?

MR. DINSMORE: And this is offered as admissions.

THE COURT: As admission against interest?

MR. DINSMORE: But not his whole deposition.

THE COURT: You may take the s t a n d. Give us the page number and the line number of the question and answer.

MR. DINSMORE: Yes, Your Honor.

THE COURT: Now, ladies and gentlemen of the jury, an admission against interest is a statement made outside of Court by an individual which the plaintiff claims has the power to bind the defendant in this case and that is why he is offering these admissions. Now it is up to you to decide and I will give you instructions on admission against interest if we get that far. You may go ahead.

[Page 117] MR. DINSMORE: This is the deposition of Edward F. Owen taken at 1:30 p.m., June 3rd, 1974, and the appearances were Mr. Richard J. Dinsmore on behalf of the plaintiff, and Mr. David A. Johnson on behalf of the defendant Owen Equipment and Erection Company? May we waive the reading of the stipulation?

THE COURT: Yes.

MR. DINSMORE: And this was before Mr. Jack M. Fitch, Official Court Reporter, Omaha, Nebraska.

"EDWARD F. OWEN,

of lawful age, being by me, Jack Fitch, first duly examined, cautioned and solemnly sworn, as hereinafter certified, testified as follows:"

This is now page 3, line 6:

"Q. Would you state your name, please?

"A. Edward F. Owen.

"Q. And where do you live, Mr. Owen?

"A. 5420 Nicholas Street.

"Q. Is that in Omaha?

"A. Right."

On line 14:

"Q. What is your business, profession or occupation?

"A. President of Paxton and Vierling Steel Company."

Line 24:

[Page 118] "Q. What is the business of Paxton and Vierling?

"A. Structural steel for buildings and bridges, some manufacturing of various farm products, other similar products."

Page 5, line 9:

"Q. Now, I understand at one time you hired a man or there was a man working here by the name of James Kroger. Did you know Mr. Kroger?

"A. Slightly, not well. He was an employee in the machine shop. I didn't know him that well. I knew him, of course."

THE COURT: "I knew of him of course."

"A. I knew of him of course.

"Q. Was he employed by Paxton and Vierling?

"A. Yes."

Page 6, line 7:

"Q. Sir, we are also concerned here with Owen Erection and Equipment Company. Do you have any interest in that company?

"A. Yes. The Owen Equipment Company is owned completely by, owned by Paxton and Vierling Steel Company. It is 100 per cent owned subsidiary.

"Q. It is a separate corporation though?

"A. Oh, yes.

"Q. That is, Owen Erection?

[Page 119] "A. Owen Equipment and Erection Company.

"Q. Owen Equipment and Erection Company?

"A. Yes.

"Q. Now, are you telling me it is your understanding that this is a wholly-owned subsidiary of Paxton and Vierling?

"A. Yes.

"Q. In other words, the corporation, Paxton and Vierling, to your information, owns all of the stock of Owen Euipment and Erection Company?

"A. Yes.

"Q. Can you tell us why that was set up that particular way or when it was set up?

"A. I can't tell you exactly when it was set up, but it was set up that way to avoid any conflict between our shop, which is a non-union shop, and working in erecting steel on the outside, which is strictly a union proposition, and it was set up and when we first started it, we did quite a few erection jobs and things of this type and we did up until the passing away or—not the passing away, but the retirement, I should say of Harry Flynn, who was our outside erection foreman, up until the time of his retirement three or four years ago, in that range, and again those records are open and available for us.

[Page 120] "Q. So I can understand it, sir, Paxton and Vierling is non-union?

"A. Yes, non-union.

"Q. A nonunion shop?

"A. Right.

"Q. And when you go outside and you would begin the erection of something, construction of something, that has to be a union job?

"A. That's right, and that is when Harry Flynn, who was the superintendent of the company, would go out and hire ironworkers or whatever he needed to put up the jobs.

"Q. And would you tell me where the headquarters of Owen Equipment and Erection Company is?

"A. Here, same headquarters.

"Q. Same headquarters?

"A. Yes.

"Q. All right, and would you tell me who the officers of Owen Erection and Equipment Company are?

"A. In effect, the same as Paxton and Vierling?

"Q. Did you consider, in your own mind, at least, in the corporate structure, that one company is the same as the other?

"A. I don't really know how to answer that. I am not quite sure.

[Page 121] "Q. I have the impression in my mind's eye and I don't know, that you have the headquarters at the same place and you have the same officers and it seems to be operated out of the same place. Is one company just the same as the other?

"A. No.

"Q. How would you distinguish when you are doing Owen Equipment and Erection Company work and when you are doing Paxton and Vierling work?

"A. Well, primarily that is when they leave the premises and they go outside and erect a job, such as the Bur-

lington building down here or the postal part of it where we erected a bunch of big trusses, and the minute they leave the gates, it is Owen Equipment and Erection Company.

"Q. One has to do with steel fabrication and the other has to do with—

"A. Field erection.

"Q. With field erection?

"A. Yes.

"Q. And does Owen Equipment and Erection Company own some cranes, sir?

"A. Yes.

"Q. How many cranes do you present own?

"A. Two.

"Q. And can you give us a description of them?"

• • •

[Page 200] THE COURT: And don't you want to add all of your other motions too?

MR. JOHNSON: I would, Your Honor, yes.

THE COURT: Have you got them written out?

MR. JOHNSON: Yes, I do.

THE COURT: I will tell you what I am going to do with it, without argument, I will tell you, Mr. Dinsmore, I am concerned about this, and I want to read those cases. I have got Judge Robinson's decision and I have even talked to him about it in the Northwestern Bell case, and I am not sure now why you didn't move to dismiss as soon as the amended complaint was filed, but of course at that time only the Omaha Public Power District was still in the case and then they went to the Eighth Circuit and got that dismissed out.

MR. JOHNSON: That is right, Your Honor, and in regard to that remark by the Court, let me also say this: As I read the cases, one of the reasons that the courts narrowly construed the doctrine of pendant and ancillary jurisdiction is for a situation just like this where the original defendant is brought in, claims are made, discovery is undertaken, and then who knows but what collusion does not exist in the case, if not practically or at least theoretically, as the basis for this doctrine, between the plaintiff and the defendant [Page 201] in bringing in the third-party defendant against whom then the plaintiff can make a direct claim when they ordinarily would not have been able to make it in the first place. That is inherent in the cases as I read them in regard to the narrow construction on ancillary and pendant jurisdiction, or the doctrine of that, and that is exactly what happened here. Owen Equipment was brought in initially as a third-party defendant and it could very well have been after counsel for a plaintiff in this case or his firm found out that they in effect did not have a case against Omaha Public Power District, who knows, who will ever know—we would get into attorney-client privilege, there is no way, I don't even want to inquire, and I don't say that is the case, but I say as a matter of theory in backing up this narrow construction of this doctrine, that is the exact basis for it, and I think that the basis for it fits into this case to a "T".

MR. DINSMORE: Judge, as to his basis number one, two and three, number one, the Court hit the nail on the head, there are very few things in Federal Court pleadings that a defendant has to allege, and I will check this specifically, as to the question of jurisdiction, it has never been brought up in his pleadings but why should the plaintiff suffer until the last date [Page 202] of trial when they finally discover and they have filed their answer the day of trial and they don't even allege in their answer, by the way Judge, anything about the principal place of business and I believe it is a requirement upon the defendant to raise, at the pleading stage, to raise this question which in the first instance they have not done for the very reason that the Court pointed out "Why didn't you bring this up before?" You certainly have had access to this defendant. You know where the principal place of business is. Mr. Dinsmore and Mrs. Kroger are not privy to the records of

Owen Equipment and Erection Company so I think in the Federal Rules of Civil Procedure it is incumbent on them to bring it up at the pleading stage that even getting away from the procedural requirements this is an exact case of ancillary or pendant jurisdiction and I think it is properly ancillary and I think that the main case on it is that United Mine Workers Case.

THE COURT: And there is a case in the Eighth Circuit of Kuhn (phonetic) against somebody, too.

MR. DINSMORE: Just to review the history of the case and I certainly don't have to tell this Court what happened, originally OPPD was brought in and we had some trouble with the political subdivisions tort claim act, and OPPD was brought in and there was proper jurisdiction [Page 203] and the Court had jurisdiction at that point in time. Thereafter the Court allowed OPPD to bring in Paxton and Vierling and Owen Equipment and Erection Company on two theories, one theory of indemnification and one theory of the third-party defendant. Thereafter Paxton and Vierling and Owen Equipment and Erection Company were brought in, and only then, did the plaintiff make application to the Court, and the Court gave approval that the plaintiff could join Owen Equipment and Erection Company as original defendants. That is exactly the principal and exactly the theory of ancillary jurisdiction. We can sit up here and guess the conjecture and Mr. Johnson can accuse me of collusion. If he wants to call Mr. Busick to come down from OPPD and if he wants me to take the stand, I will be more than happy to. Let's look at the facts and let's not stand up here and call attorneys names and accuse them of collusion. If there is any collusion or anything he maintains there is let him put his affidavit on file and I will be happy to face that. The point is the Court has jurisdiction in the first place. They analogize this ancillary jurisdiction to the equity doctrine and they call it the "clean-up doctrine." The fact that that primary issue is an equity question and there are questions of law which subsequently develop in an equity [Page 204] case, the equity court will take jurisdiction and

that is called the clean-up doctrine. Why should the plaintiff have to jump all over the United States and jump from court to court when they were properly in the court in the first place. And of course the Judge had not sustained the motion for summary judgment and I should point out that the reason you sustained the motion for summary judgment was not on jurisdictional grounds, it was on subtantive law. What if the Court had not sustained that? Do you mean that in that instance you would not be asked to reverse your decision in the first place and say that Owen Equipment and Erection Company should not be brought in here? That is exactly the reason, so that if the Court in the first instance has proper jurisdiction that all parties can be brought to one courtroom and to one jurisdiction and all at one time and prevent a multiplicity of lawsuits so that at one time all the issues and all of the facts can be determined and so on the first instance you will look to whether there was proper jurisdiction and the Court had proper jurisdiction, and that is the theory of ancillary jurisdiction and that is what happened here.

THE COURT: Do you agree that if there was no ancillary jurisdiction question that to properly plead the case in this Court against the sole defendant [Page 205] Owen Equipment and Erection Company that there must be proof that they are a Nebraska corporation and had their principal place of business in Nebraska and that you have diversity, do you not?

MR. DINSMORE: Not to try to get around anything, but aside from that very important issue of ancillary jurisdiction, I would also point out to the Court, to get back to the question of substantial justice, whose requirement is it when a party defendant is brought into a lawsuit and I think in checking the Federal Rules of Civil Procedure, it can't be specifically answered, and again this is coming off the top of my head but I think it is Rule Six or Seven or something like that, the defendant has to specifically raise in the answer, so even saying there was not any type of ancillary or pendant jurisdiction, the defendant has waived its right. It has filed its answer. It has filed an amended

answer and now at the close of the plaintiff's case they are attempting to get out by raising a jurisdictional question. I think it is too late. In addition to that, Your Honor, I would like to check the Federal Rules, but from the facts in front of the Court and I am not disputing the facts,—

THE COURT: I am going to just take the motion under advisement and I would like a brief in answer to [Page 206] this tomorrow morning because I am concerned about this question. Now, do you have any further motions?

MR. JOHNSON: Yes, I do, Your Honor.

THE COURT: If you have got them typed, don't read them.

MR. JOHNSON: No, Your Honor, I am sorry, I don't. Quickly, in response to Mr. Dinsmore, there are a few things that I want to mention. First of all, I am not accusing Mr. Dinsmore of anything. As a matter of fact, Your Honor, I think he would be remiss in his duty and obligation to his client if he did not attempt in every way he could to represent her as I am sure he has, and I mention that because of this matter of collusion that has been mentioned in the Court.

THE COURT: I understood that to be an example of the reason for the ruling and not as to the facts of this case.

MR. JOHNSON: Also in regard to his initial comment about our lateness in raising this, I would just say this—

THE COURT: That can be raised at any time.

MR. JOHNSON: That is right. This is not an equitable case.

THE COURT: That has been the rule since time began.

[Page 207] MR. JOHNSON: As to laches, estoppel, or waiver, the Court either has it or it doesn't.

THE COURT: The only thing that concerns me is this pendant or ancillary question. I once had jurisdiction and

then because one defendant is dismissed out of it, do I still retain the case? He is going to present a brief to that and then I want you to answer it. That does worry me. There is no question in my mind that it is proper to have jurisdiction against a sole defendant, say they just sued Owen Equipment alone, that you had to allege they had to be a Nebraska corporation and they had their principal place of business in Nebraska.

MR. DINSMORE: I agree with the Court.

THE COURT: And the proof shows that they had their principal place of business in Carter Lake, Iowa, and you did allege it in the amended complaint that they were a Nebraska corporation and they had their principal place of business in Nebraska.

MR. DINSMORE: Is that in the amended complaint?

THE COURT: That is in the amended complaint.

MR. DINSMORE: I am sure the Court is correct.

THE COURT: That the defendant, Owen Equipment and Erection Company is a Nebraska corporation with its [Page 208] principal place of business in Nebraska.

MR. DINSMORE: Is that paragraph one or two?

THE COURT: That is paragraph two of the amended complaint filed November 9, 1973.

MR. DINSMORE: Which I think they admitted in their answer.

MR. JOHNSON: No, we did not.

THE COURT: I don't think they ever admitted anything. The proof here before this Court today by the secretary of the Owen Equipment and Erection Company, their principal place of business was in Carter Lake, Iowa. That is the proof before the Court so there is a question here and it can only be obviated if this Court has pendant or ancillary jurisdiction. That is the point that I want to check overnight, but I am going to take that motion under advise-

ment and I will be able to tell you something about it tomorrow morning but I will require you to proceed while I am taking it under advisement.

All right now if you want to dictate the rest of your motions in, you can do that, because I would like to get this thing moving today. Are you going to introduce any evidence?

MR. JOHNSON: Yes, I am, Your Honor.

THE COURT: With the understanding that I am [Page 209] going to take all your motions under advisement?

MR. JOHNSON: Yes.

THE COURT: Is it necessary — could you write up your motions?

MR. JOHNSON: To save time, I can dictate them and have them typed.

THE COURT: All right, have them typed and file them and at this time for the record, I will assume that they have been filed and that I am taking them under advisement until the close of all the evidence in this case.

MR. JOHNSON: The two motions that I had in mind, Your Honor, that I intended to dictate now just for identification are a motion to strike the opinion testimony of the witness Samuel McMinn who testified yesterday in regard to his opinion, and secondly of course a motion for a directed verdict or in the alternative for a dismissal.

THE COURT: I understand.

MR. DINSMORE: Your Honor, Mr. Johnson has indicated to me and I may have a motion, it depends on what he intends to do, that he intends now to elicit some expert testimony. He told me that he intends to offer it as rebuttal and I would move in limine that that be stricken. He has never endorsed any such witness. He

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[Page 338] which has been criticized as I know the Court well knows and in addition to another case that has been in effect reversed and the opposite side has been taken and I want to say this for Mrs. Kroger's benefit, my personal feeling is this that—and I am sure the Court is doing what the Court feels is right under these circumstances—I personally feel that a great injustice would be done to Mrs. Kroger if this case were submitted to a jury with the motions under advisement and if a jury should happen to return a verdict in her favor to then have the Court on the basis of the issues that have been raised in effect take that verdict away from her. Of course if they return a verdict for the defendant, that makes the matter moot, and I would, with all due respect to the Court, I would urge upon the Court to make a ruling in connection with the motion to dismiss prior to the time this matter is submitted to the jury. I guess my point is that if there is no jurisdiction, there is no jurisdiction, and I am as convinced as I have ever been, and ordinarily you do not get a question that you say is that clearcut, but I am convinced as I can be that there is no jurisdiction in connection with this case.

THE COURT: The only one that even comes close is the ancillary question you brought up, once [Page 339] the Court has jurisdiction that they can retain it for the purpose of settling the dispute to save multiplicity of suits and if I would dismiss it for lack of jurisdiction, of course, the plaintiff is out of luck entirely because of the Iowa Statute of Limitations, and I still am going to adhere because I am thinking of court time more than anything else. I feel sorry for Mrs. Kroger and I don't know what I am going to do yet, I am still going to look up cases and I keep thinking all the time why is it out of 400 Federal Trial Judges, I get the cases where there has never been one like it before, never.

MR. DINSMORE: Judge, I apologize to the Court for not getting my briefs down to you until about five minutes before 10:00. I spent much time last night at Creighton and I am just as convinced as Mr. Johnson is, I found a case that was decided by Judge VanPelt that has been reported.

THE COURT: And it was not appealed.

MR. DINSMORE: And it was not appealed.

THE COURT: I know about that case.

MR. DINSMORE: And it is directly on point and there is Olson versus the United States versus Frenchman Cambridge Irrigation District, 38 Federal Rules Decisions 489, and, Judge, it is exactly on point. He cites all of the cases and it just happens backwards when you are [Page 340] doing research and I found all the other cases and found his case last and then he cites all of the cases in his case and he also cites some very excellent annotations especially one found at 33 Federal Rules Decision 27. Judge, the case is right on point. There is a split in the district and this all arises out of Rule 14, and Rule 14 saying that a plaintiff can bring a claim against a third-party defendant and it makes no mention whatsoever in Rule 14 about jurisdiction. That leaves it up to the Courts to decide. The rule in Nebraska, and there is no later decision than Judge VanPelt's is that the plaintiff even if there is no jurisdiction, even if there is no diversity between the plaintiff and the third-party defendant, he has ruled and has cited authorities in his opinion that it is not necessary, once the Court has jurisdiction, just as you were mentioning yesterday, the Court at one time can consider all of the claims and the plaintiff can bring a claim against a third-party defendant.

THE COURT: I knew about the case and I have even discussed this with Judge VanPelt but I do want to study it over, but I am still concerned about it. I am not sure whether his decision would have been upheld by the Circuit if it had been appealed.

MR. JOHNSON: Your Honor, may I indicate another [Page 341] case that I do not know if the Court has read or not but I have a photostatic copy without the front page that it would be 271 Federal Supplement page, I believe, 361. I have pages 362 and 363 and I have read the entire case.

THE COURT: Where did it come out of?

MR. JOHNSON: It came out of—I don't have the front page and I don't know the Circuit but I wanted to call the Court's attention to the case in light of this language that appears on page 362 where it is talking about the revision of Rule 14 which Mr. Dinsmore has brought out, this Court whichever Circuit it was said that when Rule 14 was amended in 1948 the Advisory Committee noted that in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend its complaint and assert a claim against an impleaded third-party would be unavailing. Now I wonder if Judge Van Pelt had the benefit of the Advisory opinion when he wrote the opinion in the Olson Case, and I call the Court's attention to this specifically in regard to Mr. Dinsmore's comment that Rule 14 is silent and it is up to the Court, it is not silent because the Advisory Committee has indicated what the majority rule is and I think this is a clear intent of

STATE OF NEBRASKA,
)
COUNT OF DOUGLAS)

A F F I D A V I T

Affiant, being duly sworn on oath deposes and states as follows:

1. That he is an attorney associated with the law firm of Swarr, May, Smith & Andersen, 3535 Harney Street, Omaha, Nebraska. That said firm represents Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. (during the period of the latter's corporate existence) on a regular basis. That during 1972 and 1973 Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. were served with summons in a case in the United States District Court for the District of Nebraska entitled Geraldine Kroger v. Omaha Public Power District, case number 72-0-481. That defense of any claims made against the above two parties was immediately turned over to the parties' liability carrier. The carrier employed the law offices of Emil F. Sodoro to represent the parties.

2. That the undersigned saw to it that all information, documents and records of the parties requested by the carrier or its attorneys was provided. Other than providing such documents, being present at conferences, depositions of the employees of the parties, and at trial, our firm was not involved in the above-captioned litigation, nor familiar with the progression of said litigation.

3. On the morning of January 6, 1976, I was informed by Mr. David Johnson that trial was to commence at 1:30 P.M. of that day. During the noon hour of January 6, 1976, another lawyer in the firm and I were discussing the case in a conversational manner when he inquired of me what the basis of federal jurisdiction was and where Paxton & Vierling Steel Co.'s principal place of business was. He was interested in that he was in the process of commencing suit in federal court on the client's behalf. This conversation aroused my curiosity concerning the Kroger case. Upon my return to the office, I examined our firm file to determine whether plaintiff was an Iowa or Nebraska resident. I discovered plaintiff was an Iowa resident. I attempted to call Mr. Johnson but could not reach him.

4. Since someone from the firm had been asked by the client to observe the trial, I went to the courthouse that afternoon and arrived during voir dire examination. After selection of the jury, there was a recess. During the recess, I informed Mr. Johnson that it appeared to me that there was no jurisdiction because in my view Owen Equipment and Erection Co. had its principal place of business in Carter Lake, Iowa. Mr. Johnson stated that that fact had never occurred to him. I suggested he should apprise the court of that possibility. Mr. Johnson stated he would check it out first.

5. The following morning, I was present in Mr. Johnson's office prior to trial. Mr. Johnson was interviewing Mr. David Morrow. After the interview was completed, we again discussed the question of jurisdiction. Prior to leaving Mr. Johnson's office, we reviewed the pleadings and it appeared to us from the pleadings that there had never been complete diversity. Mr. Johnson instructed a law clerk to research the question and submit a brief to Mr. Johnson as quickly as possible.

Further Affiant saith not.

Robert J. Becker

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES MAR. 29, 1981 STATE OF NEBRASKA

Subscribed and sworn to before me this 29th day of June,

Julie A. Troshynski

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

A F F I D A V I T

DAVID A. JOHNSON, of lawful age, being first duly sworn on oath, deposes and says:

1. That he is associated with the law firm of Emil F. Sodoro, P.C., the firm that represented Owen Equipment and Erection Company in this action. The litigation file was assigned to this affiant on or about November, 1973, and this affiant was actively involved as attorney for the said Owen from that time through trial.

2. This affiant has carefully reviewed the opinion of this court filed June 21, 1977, particularly in light of this court's finding that defendant engaged in "subtle and adroit pleading", that defendant "connived for himself an unfair advantage" and that the question of the citizenship of Owen had been "concealed" for some two years after the filing of the Amended Complaint. This affiant adamantly denies that any of the above findings by this court are true.

3. This affiant further states that he never engaged in any intentional concealment of the citizenship of Owen. That he is unaware of anyone associated or employed by defendant or any of defendant's representatives or anyone, for that matter, who intentionally concealed the citizenship of Owen at any time before trial.

4. This affiant is unaware of the issue ever being discussed, communicated, alluded to, or thought of by anyone until the second day of trial when Mr. Robert Becker, corporate counsel for Owen, mentioned the question to this affiant. This affiant had the question researched and upon affirmation that this was, in fact, a viable issue it was presented to the court during trial.

Further affiant saith not.

David A. Johnson

Subscribed and sworn to before me this 29th day of June, 1977.

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES MAR. 29, 1981 STATE OF NEBRASKA

Julie A. Troshynski

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
a Nebraska Corporation,
Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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PRIESMAN GRAPHICS—OMAHA, NEBRASKA

INDEX

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is set forth in Appendix A, pages 1-36 of the Petition. The Order denying the Petition for Rehearing en banc is set forth in Appendix B, page 37 of the Petition.

STATEMENT

In the opinion of Judge Talbot Smith, the factual history of the litigation has been meticulously and accurately set forth in the opinion of the United States Court of Appeals for the Eighth Circuit found in Appendix A of the Petition. Respondent, therefore, adopts such statement as its statement of facts in preference to the Statement of Facts presented by Petitioner.

While Petitioner's statement of facts is accurate insofar as it goes, Respondent feels that the chronological sequence of events has been inadvertently transposed in a manner that tends to confuse rather than clarify.

In addition thereto, therefore, it may be of some assistance to include a brief timetable of the history of the litigation as appears below.

(All references in the Time Table are from Appendix, Volume I filed in The United States Court of Appeals For The Eighth Circuit.)

Time Table

November 24, 1972	Plaintiff's complaint was filed against Omaha Public Power District. (App. I, 4)
August 24, 1973	Omaha Public Power District filed a third party complaint against *Owen Construction Co., Inc.* (App. I, 7)
September 7, 1973	Omaha Public Power District filed motion for voluntary dismissal of Owen Construction Co., Inc., asking leave to file an amended third party complaint against Owen Equipment and Erection Company, reciting that it had been confused with respect to the name of the proper defendant. (App. I, 12)
September 7, 1973	The Court entered an order pursuant to the motion ordering: "That third party Defendant, Owen Construction Co., Inc., an *Iowa Corporation*, should be and hereby is dismissed from this action, with prejudice. IT IS FURTHER ORDERED that the defendant and third party Plaintiff should be and hereby is granted permission to file an amended Third Party Complaint naming Owen Equipment and Erection Co., a *Nebraska Corporation*, as an additional third party defendant in this action." (App. I, 13-14)
September 11, 1973	Omaha Public Power District filed a third party complaint against Owen Equipment and Erection Co. describing such company as "a Nebraska Corporation." (App. I, 14-17)
September 28, 1973	Plaintiff filed motion to add a party defendant, Owen Equipment and Erection Co., a Nebraska Corporation. (App. I, 19)
October 15, 1973	Owen Equipment and Erection Company filed an answer to the

	third party complaint filed by Omaha Public Power District in which it "Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska" and denied generally all other allegations. (App. I, 19)
October 30, 1973	Omaha Public Power District filed motion for summary judgment. (App. I, 20)
November 9, 1973	Plaintiff filed amended complaint against Owen Equipment and Erection Co. describing it in caption as a "Nebraska Corporation." (App. I, 23-28)
November 27, 1973	Owen Erection & Equipment Co. filed an answer to plaintiff's complaint admitting that it was a corporation "organized and existing under the laws of the State of Nebraska" coupled with a general denial of the allegations of plaintiff's amended complaint. (App. I, 28)
February 12, 1975	Final judgment was entered in favor of Omaha Public Power District against the plaintiff. (App. I, 41)
February 14, 1975	Argument in Court of Appeals.
October 1, 1975	Judgment affirmed by United States Court of Appeals, Eighth Circuit. (App. I, 42-47)

November 14, 1975	A motion for summary judgment filed by Owen Equipment & Erection Co. against plaintiff (which had been filed September 24, 1974) was heard on depositions, affidavits and interrogatories and denied by the Court. (App. I, 48) Nowhere in either the motion for summary judgment or in the evidentiary hearing on the motion did Owen Equipment & Erection Co. raise any issue of jurisdiction or claim a lack of diversity or adduce facts as to where its claimed principal place of business might be. (App. I, 48)
January 12, 1976	Trial commenced and a jury was empaneled. (App. I, 49)
January 13, 1976	Plaintiff's evidence was adduced. (App. I, 51)
January 14, 1976	Just before noon the attorney for Owen Equipment & Erection Co. asked the witness Petersen, secretary of Owen Equipment & Erection Co., an adverse witness called by plaintiff, if the principal place of business of the defendant was in Carter Lake, Iowa, and received an affirmative (App. II, 136) reply. Shortly after one o'clock p.m., on the third day of trial, defendant raised lack of diversity. (App. I, 49-50)

A brief word about the situs of the events involved seems appropriate. The situs of the events giving rise to this litigation is a small piece of land on the west side of the Missouri River. Traditionally, it is believed that this great river clearly marks the boundary between the states of Nebraska and Iowa; indeed, all but limited local maps show it to be. However, many years ago, that river avulsed at one of its bends and left a small piece of land on the west side of the river that remains Iowa. The exact boundary lines in this geographical no-man's land are mostly unmarked and confusing. Several Omaha, Nebraska companies, including the petitioner in this case, own and maintain facilities in the area, some of them being on Iowa land, although they are Nebraska corporations.

The respondent's decedent, the respondent and their family were residents of Iowa but living west of the Missouri River. The petitioner was and is a Nebraska corporation owning large, heavy duty cranes which are mobile and operate in both states in areas completely west of the river as well.

Through the negligence of the petitioner, the Owen Equipment and Erection Company, a Nebraska corporation, plaintiff's husband was killed by electrocution when standing near one of the petitioner's large cranes which was swung into an overhead high tension line, installed by the Omaha Public Power District of Nebraska (OPPD). No complaint is still made that the respondent's decedent was anything but an innocent victim of the negligence of the petitioner nor that the verdict was excessive in any way.

ARGUMENT

I.

DISCUSSION OF THE PETITION FOR WRIT OF CERTIORARI

From a procedural standpoint, if a petition for a writ of certiorari is to be viewed in the light usually employed for the examination of any pleading asking for relief, the petition filed in this case is on its face demurrable, subject to a motion to dismiss or summary action of denial of certiorari.

The reasons for so stating are as follows:

1. Under "JURISDICTION" found on page two of the Petition, it is recited that the opinion and judgment of the Court of Appeals was filed on June 21, 1977, and that a Petition for Rehearing, Motion to Expunge Portions of the Opinion and Suggestion for Rehearing en Banc was filed on the 16th day of August, 1977. Whether this is correctly or incorrectly stated, it is what is shown on the jurisdictional statement in the Petition for Writ of Certiorari. Rule 40 of the Rules of Appellate Procedure for the Courts of Appeals requires such a filing to be within fourteen (14) days after entry of judgment.

2. The requested relief in the Petition for Writ of Certiorari appears at page forty-five (45) in the last paragraph and is as follows:

> This petitioner, therefore, respectfully requests that this court grant a writ of certiorari to the United States Court of Appeals

> to the Eighth Circuit to review the opinion and judgment of the Eighth Circuit Court of Appeals, rendered in these proceedings on October 16, 1977.

To our knowledge no opinion or judgment was rendered by the Court of Appeals for the Eighth Circuit on October 16, 1977, nor was any other action taken by such Court on that day or any other day near that date.

If we go beyond that and assume that the month was mistakenly described, the only other date that could have conceivably been meant would have been August 16, 1977. Taking a charitable view that the erroneous prayer of the petition was typographical, we come to the conclusion that all petitioner is asking in its petition is to secure a review by the Supreme Court of the correctness of the Court of Appeals in declining to grant a rehearing en banc. The jurisdictional statement in the Petition (page 2, line 13) recites that "The petition for Rehearing en Bank was denied by an evenly divided court."

This is purely discretionary as Rule 35 reads, "Such a hearing or rehearing is not favored and ordinarily will not be ordered except "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

Even if petitioner's full prayer for relief as expressed in the Petition were to be granted, the extent of this grant would seem to be limited to a remand to the

Court of Appeals to hold a rehearing en banc. It is difficult to see how such would be effective in disposing of the litigation.

II.

DISCUSSION OF CASES CITED BY PETITIONER

Elaboration on the opinion of Judge Talbot Smith, Senior District Judge, Eastern District of Michigan, who sat with the Court of Appeals for the Eighth Circuit in this case would indeed be "gilding the lily." His obviously meticulous research of both the facts and the law of the case needs no embellishment by the respondent.

While confining the effect of the opinion narrowly to the particular and unique facts of the case at bar, we submit that his research of the history of the principles involved constitutes a most scholarly treatise on the subject under consideration.

We submit that the manner in which he distinguishes the cases relied on by the petitioner accomplishes that precious combination of legal idealism combined with practical trial realism that leads inevitably to what is undeniably a just result. In doing so, he takes this particular case as it is without doing violence to doctrines prevailing in other cases under different fact situations.

III.

PETITIONER'S CLAIM OF FIFTH AMENDMENT VIOLATIONS

The only new matter raised by petitioner is, we suggest, an attempt to "red flag" the case and attract the attention of the Court by injecting the magic of a claimed violation of constitutional rights.

The bizarre theory advanced in support of this is the claim that petitioner's attorney was deprived of his rights by the fact that he was interrogated by the three judges on a matter on which he was unprepared and that such interrogation resulted in eliciting damaging admissions from him during the oral arguments.

While apparently not regarding the client's interests as worthy of even a request for stay of the mandate (the mandate was sent down to the United States District Court on August 23, 1977), petitioner's attorney elects to continue to the utmost his charges of unfair treatment and seek still another forum in which to vent his ire.

The history of such friction with the courts began on February 6, 1976, at that time against the Honorable Robert V. Denney who has, since 1971, served as an honored, respected United States District Judge for the District of Nebraska. The attack upon Judge Denney is in the motion for new trial that may be found at page 91 of Vol. I of the Appendix filed in the Court of Appeals. To his credit, Judge Denney graced himself, as a less temperate judge might not have, and simply prefixed his memorandum opinion with the following:

> "The Court shall ignore counsel's irrational inflammatory language in his supporting brief directed at his misconception of judicial impropriety, and shall address the legal issues raised." (App. I, 121)

Most recently, in the Petition for Writ of Certiorari, (pages 36-37) the three judges of the United States Court of Appeals who heard the case have become the targets of petitioner's discontent.

Petitioner's counsel complains that his Fifth Amendment rights were violated by the Court of Appeals because of, as he himself puts it, "findings of underhanded, unethical conduct." (See page 37, Petitioner's Brief.) He further claims that:

> "The court's opinion unequivocally claims petitioner has perpetrated acts of fraud, not only upon the respondent but upon the Federal judicial system." (Page 36, Petitioner's Brief.)

In the opinion in this case (App. A, Page App. 4) the Honorable Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation, states at Paragraph 2 on that page:

> Appellant *finally* admitted on oral argument to us, *after close questioning*, a point clear from the pleadings, namely, that it had not specifically challenged the diversity jurisdiction of the court at any time during the long course of the pleadings, and particularly had not done so in response to the plaintiff's amended complaint filed on November 9, 1973, charging Owen to be "a Nebraska corporation with its principal place of business in Nebraska." (emphasis ours)

Where was the Fifth Amendment violated by a court questioning a lawyer arguing a case before them? Are *Miranda* warnings required to be given?

All three judges who conducted the questioning agreed on the subject of misdirection, deception, deceit, and as petitioner chooses to put it, "findings of unethical and underhanded conduct."

We submit that if a favorable result based on jurisdiction can be achieved by these methods then it could also be achieved by false answers to discovery interrogatories or perjury in discovery depositions — the principle would be the same. Penalties later levied against the malefactors would be of little value to a widow and children sent empty handed from the court system.

The pattern of misstatement continues even at this moment in this court.

At line 18 of page 36 of the petitioner's brief for certiorari filed herein, we find this statement:

> "The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit."

Yet, in Judge Denney's Memorandum Opinion of February 6, 1976, we find:

> "Likewise, defendant's exception to this Court's comments concerning defendant's long silence on the jurisdictional issue is the result of failing to comprehend the Court's holding. This Court held that retention of ancillary jurisdiction is discretionary with the trial court. The untimeliness of defendant's motion is unquestionably relevant to the exercise of discretion." (App. I, 121)

To further correct the misstatement by the petitioner in its present brief before this Court, i.e., that the issue of concealment came up for the first time during oral argument before the Court of Appeals, we need only note that on January 22, 1976, the memorandum opinion of Judge Denney stated:

> "Despite the fact that defendant has exclusive knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska." (App. I, 86)

We submit that in view of the foregoing the purported naivete of the petitioner and the claims that the interrogation by the judges of the Court of Appeals took their attorneys by surprise become difficult to believe. An attempted exculpatory affidavit, signed by another of the attorneys for the petitioner after the opinion of the Court of Appeals, was, of course, not subject to impeachment either by confrontation or cross examination and adds or detracts nothing from a situation correctly diagnosed by all three judges of that court. It should be noted that if the facts contained in the *ex parte* affidavit were valid, those facts would have been available at the time of the oral argument in verbal response to the "close questioning" of the Court of Appeals on this exact subject.

CONCLUSION

It is respectfully submitted by the respondent that the scholarly opinion of Judge Smith logically distinguishes the cases urged by the petitioner in a manner devoid of violence to the holdings contained therein, prevents a gross miscarriage of justice in this particular case and adds valuable guidelines to standards of conduct in the trial of cases in the courts of the United States, both at the trial and appellate level.

The grueling, uphill, five year battle in the courts by the widow of James Kroger should, we submit, end at this point with the just compensation that is her entitlement.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

AUTHORITIES CITED

AUTHORITIES CITED—Continued

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Nebraska overruling the defendant's (petitioner's) Motion to Dismiss for Lack of Subject Matter Jurisdiction is unreported, but appears in the Appendix (A. 54).

The memorandum opinion of the United States District Court for the District of Nebraska overruling defendant's Motion for New Trial or in the Alternative

Judgment Notwithstanding the Verdict is unreported, but appears in the Appendix (A. 60).

The opinion of the Court of Appeals is reported at 558 Fed. 2d 432 (8th Cir. 1977) and can be found in the Appendix to the Petition for Certiorari at App. pp. 1-36.

The Order Denying Petition for Rehearing En Banc by an evenly divided Court is unreported and appears in Appendix B to the Petition for Certiorari at App. p. 37.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on June 21, 1977. See Appendix A to Petition for Certiorari, App. pp. 1-36 therein.

Subsequent thereto a Petition for Rehearing, Motion to Expunge Portions of Opinion and Suggestion for Rehearing En Banc was filed on the 16th day of August, 1977. The Petition for Rehearing En Banc was denied *by an evenly divided Court* (see Appendix B to Petition for Certiorari, App. p. 37). The Petition for Certiorari was filed less than ninety days from the date of the overruling of said Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

This Court granted review of this case on January 9, 1978. Pursuant to the memorandum of the Supreme Court to Counsel in Cases Granted Review on January 9, 1978, counsel for the petitioner was to designate portions of the record to be printed by January 19, 1978 and counsel for

the respondent was to cross-designate by January 30, 1978. On January 18, 1978 a letter was hand-delivered to counsel for the respondent containing a designation of the portion of the record to be printed in the Appendix tc be filed in this matter on or before February 23, 1978. At that time counsel for the respondent was also supplied with a statement of issues pursuant to Rule 36 (2) of the Supreme Court Rules, 28 U. S. C. A.

Kroger, respondent, alleged the amount in controversy exceeded $10,000. The trial court, however, never acquired subject matter jurisdiction of this action. The alleged basis of jurisdiction was diversity of citizenship. However, the respondent and Owen Equipment and Erection Company, petitioner, were both citizens of Iowa at the time of the filing of the complaint.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C. § 1332 (a):

> §1332. *Diversity of citizenship; amount in controversy; costs*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Fed. R. Civ. P. 8(b):

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Fed. R. Civ. P. 12(h) (3):

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Fed. R. Civ. P. 14:

(a) *When Defendant may Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case

references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

Fed. R. Civ. P. 82:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9 (h) shall not be treated as a civil action for the purposes of Title 28, U. S. C. § § 1391-93.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED FOR REVIEW

An action for damages for the wrongful death of James D. Kroger was commenced in the United States District Court for the District of Nebraska. The action was brought by respondent herein, Geraldine Kroger, Administratrix of the Estate of James D. Kroger, De-

ceased. She originally named as party defendants the Omaha Public Power District and Paxton-Vierling Steel Company. The petitioner was then brought in as a third-party defendant by the Omaha Public Power District. The respondent then filed an Amended Third-Party Complaint naming petitioner as defendant.

Both Paxton-Vierling Steel Company and the Omaha Public Power District were dismissed out of the suit, leaving as party plaintiff, Geraldine Kroger, *an Iowa citizen,* and as party defendant, Owen Equipment and Erection Company, a Nebraska corporation having its principal place of business in Carter Lake, Iowa, *therefore also being a citizen of Iowa.*

The petitioner then filed a Motion to Dismiss or in the Alternative for Directed Verdict claiming that the court did not have jurisdiction of the subject matter of the action since there was no diversity of citizenship between the respondent and the petitioner. But, the trial court overruled the Motion to Dismiss claiming that the Court acquired power to hear the whole matter under *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966). Petitioner's Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial, was likewise overruled. The United States Court of Appeals for the Eighth Circuit affirmed that judgment. The questions thereby arising are:

1. Whether the Trial Court acquired power to decide the claim of the respondent against petitioner.

2. Whether the Trial Court could exercise its discretion to create jurisdiction where none, in fact, existed.

3. Whether the United States Court of Appeals for the Eighth Circuit erred in making findings of fact that petitioner intentionally concealed its principal place of business without giving petitioner and its counsel a hearing on that issue in violation of the Fifth Amendment of the United States Constitution.

4. Whether the Trial Court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for that plaintiff to assert a claim against the third-party defendant.

5. Whether the Trial Court erred in finding that jurisdiction existed between respondent and petitioner (citizens of the same state) in Federal Court where no federal question was presented and the main cause of action between respondent and the defendant Omaha Public Power District (citizens of different states) had been dismissed prior to trial at request of defendant Omaha Public Power District.

STATEMENT OF THE CASE

Paxton & Vierling Steel Company is a Nebraska Corporation having its principal place of business in Carter Lake, Iowa (A. 5). Respondent's decedent, James D. Kroger, was an employee of Paxton & Vierling (A. 80). On the 18th day of January, 1972, at the request of a supervisor employed by Paxton & Vierling Steel, respondent's decedent assisted other Paxton & Vierling

employees in moving a large steel air tank (A. 79, 80). The steel air tank was obstructing construction activity at a construction site within the Paxton & Vierling Building (Transcript of Testimony p. 179).

Lloyd Feller, an executive vice-president of operations of Paxton & Vierling, gave the original order to move the steel air tank (Transcript of Testimony p. 179). That order was passed down to Mr. Clem Rosemaric, respondent's decedent's immediate supervisor (A. 80).

A large Lorraine crane was being used to move the tank. The crane was mounted on a truck which could move about inside the Paxton & Vierling Building (A. 67).

A steel cable ran from the boom of the crane to the chains which were wrapped around the air tank (A. 82, 83). Respondent's decedent was standing on the ground next to the steel tank assisting in steadying the tank as the crane moved from the construction site to the west end of the building (A. 83). When the crane reached the west end of the building and could go no further, the boom was raised so that the tank could be lowered (A. 83, 84). Respondent's decedent was still standing near the air tank (A. 86). As the boom of the crane was lifted, it came in close proximity to overhead power lines and an arc of electrical current jumped from the air tank into the body of respondent's decedent, causing his death by electrocution (A. 73).

On the 24th day of November, 1972, the respondent filed her complaint in the United States District Court for the District of Nebraska, claiming damages sustained

as a result of the wrongful death of James D. Kroger (A. 4). The action was brought against Omaha Public Power District (OPPD) and Paxton & Vierling (A. 4). Both Paxton & Vierling and OPPD filed motions to dismiss. Paxton & Vierling was dismissed because of a jurisdictional defect. OPPD then brought a third-party complaint against Paxton & Vierling and Owen Construction Company, Inc. claiming that both said third-party defendants were liable to the Omaha Public Power District for any sums which respondent would recover from OPPD on her complaint (A. 8).

The third-party plaintiff was then granted permission to file an amended third-party complaint naming Owen Equipment and Erection Company, a Nebraska corporation (petitioner), as an additional third-party defendant and dismissing Owen Construction Company, Inc., an Iowa corporation, from the third-party complaint (A. 12-14).

A motion to dismiss was then filed on behalf of Paxton & Vierling claiming that the complaint failed to state a claim upon which relief could be granted (A. 18). Petitioner filed its answer to the third-party complaint of OPPD (A. 19). Respondent was then granted leave to file amended pleadings adding petitioner as a party defendant (A. 23). The amended complaint was filed on November 9, 1973, naming petitioner as a party defendant and dropping Paxton & Vierling as a defendant (A. 23).

Petitioner filed its answer to the plaintiff's amended complaint (A. 28). The trial court then granted Omaha Public Power District's motion for summary judgment

and dismissed it from the lawsuit (A. 35). The United States Court of Appeals for the Eighth Circuit sustained that order of the trial court (A. p. 41).

Petitioner also filed a motion for summary judgment (A. 39). However, that motion was subsequently overruled (A. 47). Petitioner then filed an additional answer to the respondent's amended complaint alleging that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action (A. 50).

The basis for petitioner's claim that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action was that since the respondent and the petitioner were both *citizens of the State of Iowa there was no diversity of citizenship* and thus no independent basis of jurisdiction. Petitioner claimed that before a plaintiff could assert a claim against a third-party defendant in the same action an independent basis of federal jurisdiction was required.

Trial of this matter commenced on the 13th day of January, 1976 (A. 65).

The jury returned a verdict in favor of the respondent and against petitioner for $234,756.00 and that verdict was reduced to judgment by the Clerk of the Court (A. 54). The Court filed its memorandum and order overruling petitioner's motion to dismiss for lack of subject matter jurisdiction (A. 54-56).

The trial court conceded in that memorandum that:

"Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defend-

ant is incorporated in the State of Nebraska and has its principal place of business there. It is now uncontroverted however, that defendant's principal place of business is in the State of Iowa. *Hence, an independent basis of jurisdiction does not exist.*" (A. 55.) (Emphasis added.)

The trial court, however, went on to hold as follows:

> "The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. See *Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.
>
> > Properly read, *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966), reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i. e., all claims, state or federal, which derive from a common nucleus of operative facts . . . (S)ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. *3 Moore's Federal Practice* § 14.27 (1), 14-569 to 14-570.
>
> This case is nevertheless novel, in that the third party plaintiff was dismissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this 'pendant' claim. Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction." (A. 55, 56).

Petitioner filed its motion for judgment notwithstanding the verdict (A. 57), and motion for new trial (A. 58), both of which were denied by order of the Court (A. 64). Petitioner then filed its notice of appeal, perfecting its appeal to the United States Court of Appeals for the Eighth Circuit (A. 64).

Among the issues presented on review to the United States Court of Appeals for the Eighth Circuit were:

1. Whether the trial court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for the plaintiff to assert a claim against that third-party defendant?

2. Whether the trial court erred in finding that jurisdiction existed between respondent and petitioner (citizens of the same state) in federal court where no federal questions were presented and the main cause of action between respondent and defendant OPPD (citizens of different states) had been dismissed prior to trial at defendant OPPD's request?

The Appellate Court found:

> " . . . In the case before us, the District Court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. Defendant Owen attacks the

applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered." (Appendix to Petition for Certiorari, App. p. 21).

The Court went on to hold:

"But beyond that, however, there are other considerations. By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly, or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.

"But plaintiff overlooks the application of the Gibbs doctrine to ancillary the litigation. The District Court had judicial power over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused or not in its retention of the cause, defendant's conduct estops it from asserting abusive discretion, not only that under the teachings of Murphy v. Kodz, supra, but also under the most elementary considerations of judicial fairness. 'Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remains silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered. . . .' The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct." (Appendix to Petition for Certiorari, Appendix A, App. p. 22).

Petitioner has now filed its Petition for Certiorari and Review was granted by this Court on January 9, 1978.

SUMMARY OF ARGUMENT

When a plaintiff asserts a claim against a third party defendant, there must be an independent basis of jurisdiction to support that claim. In this case, it is conclusively established that respondent (plaintiff below) and petitioner (third party defendant below) were both citizens of the State of Iowa and, therefore, there was no independent basis of jurisdiction to support the claim made by respondent against petitioner.

Rule 12(h)(3) of the Federal Rules of Civil Procedure provides that whenever it appears that a court lacks subject matter jurisdiction, either by suggestion of parties or otherwise, the court shall dismiss the action. On the second day of trial, after testimony from petitioner's corporate office that its principal place of business was in Carter Lake, Iowa, petitioner filed an amended answer, claiming there was no subject matter jurisdiction of the action. The trial court denied that Motion to Dismiss, claiming that it acquired power under *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), to hear the entire claim. The only party with whom there had been diverse citizenship, the defendant, Omaha Public Power District, was dismissed from the action prior to trial, leaving before the court a state law claim involving citizens of the same state. A judgment was entered against the petitioner and in favor of the respondent in the sum of $234,756.00.

A claim by a plaintiff against a 3rd party defendant must be supported by an independent basis of jurisdiction. Since there was none in this case the court had no power to enter the judgment. Moreover, since OPPD was

dismissed prior to trial petitioners should also have been dismissed. Under *Gibbs,* if the state claim is dismissed prior to trial the federal claim likewise must be dismissed.

On appeal, the United States Court of Appeals for the Eighth Circuit made findings of fact and inferences of material fact which were not made by the trial court without granting petitioner a hearing, in violation of the Due Process Clause of the 5th Amendment. The Eighth Circuit found that the petitioner used "subtle and adroit pleading" to gain a substantial advantage. In its Answer which it filed to respondent's Amended Complaint, adding petitioner as defendant, petitioner claimed it was a corporation organized and existing under the laws of the State of Nebraska. Petitioner neither admitted nor denied the situs of its principal place of business. Although, the lack of such denial is completely within the provisions of Rule 8(b), the petitioner denies that there was any intentional scheme to conceal petitioner's principal place of business.

This case is unusual in that the respondent did not file her Complaint against the petitioner until nearly two months before the statute of limitations would bar the claim. The petitioner filed its general denial to protect Answer Day approximately six weeks before the statute ran. No further action occurred on the case until the 3rd day of June, 1974, when the respondent took the deposition of petitioner at its principal place of business in Carter Lake, Iowa. The respondent was the party attempting to assert the existence of federal jurisdiction. Since there is a presumption against the existence of federal jurisdiction, the party attempting to involve the federal court's jurisdiction bears the burden of proof on that issue. Therefore, on the 3rd day of June, 1974, the respondent should

have known that she could not go forward with her burden of proving subject matter jurisdiction.

In *M. C. and L. M. Railway Co. v. Swan,* 111 U. S. 379 (1897) this court held that the rule "is inflexible and without exception" that a court of its motion must deny its own jurisdiction and that of all other courts of the United States where jurisdiction does not appear on the record. This is because of the presumption against the existence of jurisdiction. The question is not what the parties may be allowed to do, but whether this court can affirm or reverse a judgment when lack of jurisdiction appears on the record.

In *American Fire & Casualty Company v. Finn,* 341 U. S. 6 (1951) this court further held that parties can never stipulate to the existence of jurisdiction and jurisdiction cannot arise by estoppel, yet the Eighth Circuit in the instant action held that petitioner was estopped by its delay in raising the lack of subject matter jurisdiction for more than two years after the statute of limitations had run.

If this defendant were "intentionally sandbagging" the court why wouldn't it have waited until the day after the staute of limitations ran to raise the issue of lack of diversity of citizenship? Why wouldn't petitioner have passed its motion for summary judgment filed September 4, 1974 on lack of subject matter jurisdiction?

The question of the petitioner's conduct, however, should in no way affect the existence of jurisdiction. In the trial court jurisdiction either exists or it does not. Jurisdiction cannot be created by discretion, waiver, estoppel, consent or stipulation. This case should have been dismissed at the trial court level.

ARGUMENT

I.

The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States in all cases where the jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

M. C. & L. M. Railway Co. v. Swan, 111 U. S. 379 (1897).

Federal Courts are courts of limited jurisdiction. That jurisdiction is only as marked out by Congress. *Aldinger v. Howard,* 427 U. S. 1 (1976).

In the early case of *M. C. & L. M. Railway Co. v. Swan,* 111 U. S. 379 (1897), this court addressed the delicate but volatile question of the exercise of jurisdiction by a federal court in cases involving diversity of citizenship. The Court stated:

> "And according to the uniform decisions of this Court, the jurisdiction of the circuit court fails, unless the necessary citizenship affirmatively appears in the pleadings or else were in the record. . . .
>
> It is true that the plaintiffs below, against whose objection the error was commited, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; *but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where the jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.* On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when otherwise suggested, and without respect to the relation of the parties to it." (Emphasis added.)

Mr. Justice Matthews, who delivered the opinion of the Court, quoted from an opinion of Mr. Justice Harlan stating:

> "And in the most recent utterance of this court upon the point in *Bors v. Preston,* anti, 252, it was said by Mr. Justice Harlan:
>
> "'In cases of which the circuit courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, have except under special circumstances, declined to express any opinion on the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; *this, because the courts of the union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record.'*
>
> "The reason of the rule, and the necessity of its application are stronger and more obvious, when, as in the present case, the failure of the jurisdiction of the circuit court arises, not merely because the record omits the averments necessary to its existence, but

because it recites facts which contradict it." (Emphasis added.)

So important was it deemed that the federal courts act only within their well defined limits of jurisdiction, that this court therein adopted a special exception to the rule that a party may not "rely on anything as cause for reversing a judgment which was for his advantage." *Dred Scott* case, 19 HOW 393-400, and *M. C. & L. M. Railway Co. v. Swan,* supra. This court reiterated that rule, emphasizing:

> "In the *Dred Scott Case,* 19 How. 393-400, it was decided that a judgment of the Circuit Court, upon the sufficiency of a plea in abatement denying its jurisdiction, was open for review upon a writ of error sued out by the party in whose favor the plea had been overruled. And in this view Mr. Justice Curtis, in his dissenting opinion, concurred; and we adopt from that opinion the following statement of the law on the point: 'It is true,' he said, 19 How. 566, 'as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Ab. Error II, 4. And this court followed this practice in *Capron v. Van Noorden,* 2 Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction. But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor.

> *The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend.* The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. *Pequignot v. The Pennsylvania Railroad Company,* 16 How. 104. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler v. Rae,* 7 How. 729. I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, *sua sponte,* if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power," (Emphasis added.)

Of equal import is the rule that:

> "unlike an objection to venue, lack of federal jurisdiction cannot be waived or overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review. *Mansfield, C. & L. M. Ry. Co. v. Swan,* 111 U. S. 379, 382. Hence, the failure of the insurance commissioner to claim, in his Petition for Certiorari, that the order of the district court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention

of this court the lack of diversity of citizenship are immaterial." *Mitchell v. Maurer*, 293 U. S. 237 (1934).

And, in *American Fire and Casualty Co. v. Finn*, 341 U. S. 6 (1951), this Court noted:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them."

Also, standing for the proposition that an objection to jurisdiction based on lack of complete diversity between the parties in a lawsuit is never waived nor is it lost by stipulations, see *Bialac v. Harsh Building Co.*, 463 F. 2d 1185 (9th Cir. 1972); *Page v. Wright*, 116 F. 2d 453 (7th Cir. 1940).

It is also well established that subject matter jurisdiction may be litigated at any time before the case is finally decided, and if the parties do not raise the question of lack of jurisdiction it is the duty of the Court to raise it on its own motion sua sponte. *M. C. & L. M. Railway Co. v. Swan, Eisler v. Stritzler*, 535 F. 2d 148 (1976), *Kenrose Manufacturing Co. v. Fred Whitaker Co.*, 53 F. R. D. 491 (1971), *Basso v. Utah Power and Light Company*, 495 F. 2d 906 (10th Cir. 1974) and Fed. R. Civ. P. 12 (h) (3).

In *Basso v. Utah Power and Light Company*, supra, the 10th Circuit stated:

> Rule 12(h) (3) of the Federal Rules of Civil Procedure provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking. Bradbury v. Dennis, 310 F. 2d 73 (10th Cir. 1962), cert. denied, 372 U. S. 928, 83 S. Ct. 874, 9 L. Ed. 2d 733 (1963). The party invoking the jurisdiction of the court has the duty to establish that federal jurisdiction does exist, Wilshire Oil Co. of Texas v. Riffe, 409 F. 2d 1277 (10th Cir. 1969), but, since the courts of the United States are courts of limited jurisdiction, there is a presumption against its existence. City of Lawton, Okla. v. Chapman, 257 F. 2d 601 (10th Cir. 1958). Thus, the party invoking the federal court's jurisdiction bears the burden of proof. Becker v. Angle, 165 F. 2d 140 (10th Cir. 1947).
>
> If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter *sua sponte*. Atlas Life Insurance Co. v. W. I. Southern Inc., 306 U. S. 563, 59 S. Ct. 657, 83 L. Ed. 987 (1939); Continental Mining and Milling Co. v. Migliaccio, 16 F. R. D. 217 (D. C. Utah 1954). Therefore, lack of jurisdiction cannot be waived and jurisdiction c a n n o t be conferred upon a federal court by consent, *inaction* or stipulation. California v. LaRue, 409 U. S. 109, 93 S. Ct. 390, 34 L. Ed. 342 (1972); Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968); Reconstruction Finance Corp. v. Riverview State Bank, 217 F. 2d 455 (10th Cir. 1955). (Emphasis added.)

But, in the instant action, the appellate court ignored each of these tenets and found that:

"In the case before us, the district court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. . . .

But the plaintiff (sic) overlooks the application of the *Gibbs* doctrine to ancillary litigation. The district court had judicial power over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused or not in its retention of the cause, defendant's conduct estops it from asserting abuse of discretion, not only under the teaching of Murphy v. Kodds, supra, but also under the most elementary considerations of judicial fairness. . . .

The doctrine of perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct."

It is the contention of the petitioner that *United Mine Workers v. Gibbs*, supra, does not apply to this case, since it deals not with ancillary jurisdiction, but rather with pendant jurisdiction. In finding that *Gibbs* was controlling, however, the Eighth Circuit chose to apply only that portion which would support the judgment of the trial court and discarded that portion of *Gibbs* which would have required the dismissal of this action.

This Court in *Gibbs* admonished that "certainly, if the federal claims are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well." As is more fully hereinafter argued under a subsequent proposition of law the defendant OPPD, *the only defendant having diversity of citizenship with the plaintiff*, was dismissed from the suit prior to trial leaving before the federal court a matter involving a state law claim and citizens of the same state.

It was argued by petitioner on appeal that this likewise compelled the dismissal of the claim by the respondent against petitioner. But the Eighth Circuit circumvented that obstacle claiming:

> "Defendant Owen attacks the applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the district court. We do not so conclude. It is but one factor, among many others to be considered."

In the case of *Basso v. Utah Power and Light Company*, supra, the defendant corporation admitted that it was "a corporation duly organized and existing under the laws of the State of Maine and is engaged, among other things, in the business of supplying electricity in the State of Utah and specifically to Carbon City, Utah." The Tenth Circuit stated:

> "Although defendant did not present evidence to support dismissal for lack of jurisdiction, the burden rested with the plaintiffs to prove affirmatively that jurisdiction did exist. . . . The defendant's failure to raise the issue before final judgment did not amount to a waiver, since a court may dismiss a case for lack of jurisdiction at any stage of the proceeding."

The Tenth Circuit then reviewed this court's decision in *American Fire and Casualty Company v. Finn*, supra, stating:

> "III.
>
> "We are mindful that it appears unjust to allow a defendant to make an attack on jurisdictional grounds after final judgment has been entered, but an opposite

result would unlawfully expand the jurisdiction of the federal courts by judicial interpretation. This cannot be done. *American Fire and Casualty Co. v. Finn,* 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951). In the *Finn case, the Supreme Court held that a defendant who removed a case to federal court and then received an adverse judgment there was not estopped from attacking his own prior removal on the grounds that the federal court had lacked diversity jurisdiction to hear the matter.* The Supreme Court reasoned that the jurisdiction of the federal courts is limited and must be carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. The Supreme Court explained that parties to an action can never stipulate to the existence of federal jurisdiction because this would give an additional power to the district courts which Congress had expressly denied. 341 U. S. at 17-18, 71 S. Ct. 534." (Emphasis added.)

The effect of the Eighth Circuit's finding is that a Federal District Court may not acquire subject matter jurisdiction over a cause of action where there is no diversity of citizenship between the parties by the mere running of the statute of limitations. The further effect of the holding is that a defendant may never raise the defense of lack of subject matter jurisdiction after the statute of limitations has run and any defendant that does so is guilty of concealment and unethical conduct.

Rule 12 (h) (3) provides as follows:

> "Whenever it appears by suggestion by the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

That rule emphasizes that a subject matter jurisdiction defect requires dismissal whenever that defect becomes

apparent, not merely prior to the running of the statutes of limitations on the plaintiff's claim.

The amended complaint of respondent against the petitioner was filed November 9, 1973 (A. 23), approximately two months prior to the running of the statute of limitations on January 18, 1974. In its answer to amended complaint filed November 27, 1973, petitioner admitted that Owen Equipment and Erection Company was a corporation organized and existing under the laws of the State of Nebraska and denied each and every other allegation in the Respondent's complaint.

The Eighth Circuit found that the petitioner's answer did not comply with the terms of Rule 8 (b). Petitioner emphatically claims that its answer conformed in all respects to the requirements of this rule. Petitioner admitted that it was a corporation organized and existing under the laws of the State of Nebraska and denied all other allegations. Rule 8 (b) specifically provides:

> ". . . the pleader . . . may generally deny all the averments except such averments or paragraphs as he expressly admits; . . ."

Less than two months after petitioner filed its answer to the amended complaint, the statute of limitations ran. No further action on the file occurred until May 23, 1974 when a hearing on OPPD's motion for summary judgment was had before Judge Denney (A. 2). The statute of limitations had already run more than five months prior to that date. The issue of the lack of subject matter jurisdiction of the court was not raised by petitioner until its answer filed January 13, 1976, the second day of trial (A. 48).

If petitioner were intentionally "sandbagging" the court, why then didn't petitioner wait until the day after the statute of limitations had run on January 19, 1974 to raise the issue of lack of subject matter jurisdiction, rather than waiting until the first day of trial to raise the issue? Why wouldn't the issue of lack of diversity of citizenship have been the subject of the motion for summary judgment which this defendant filed September 4, 1974? (A. 39).

The only reason this issue was not raised at an earlier point in the proceedings was that counsel failed to examine that issue. During trial, appellant's corporate counsel, Robert Becker of the law firm of Swarr, May, Smith & Andersen, advised Attorney David A. Johnson who was trying this case on behalf of Owen Equipment and Erection Company that Owen was a Nebraska corporation, but that its principal place of business was in Iowa, and that there was no subject matter jurisdiction. Shortly thereafter, a motion to dismiss was filed on behalf of Owen Equipment and Erection Company. This is the first time this matter was given any consideration by petitioner. (See affidavits of corporate and trial counsel from petition for rehearing in the Appendix, A. 102, 103.)

Likewise, it is obvious that the matter was never considered to be an issue by counsel for respondent who took at least four pre-trial depositions in the corporate office of defendant in Carter Lake, Iowa. Two of these depositions were taken of corporate officers.

But it is beyond the understanding of petitioner how the issue of concealment could even come before the 8th

Circuit. The rule of the Eighth Circuit as well as other circuits throughout the nation has unanimously been that there is a presumption against the existence of Federal jurisdiction, and thus the party involving the Federal court's jurisdiction bears the burden of proof as to its existence. See *M. C. & L. M. Railway Co. v. Swan,* supra; *Basso v. Utah Power and Light Co.,* supra; *Emmke v. DeSilva,* 293 Fed. 17 (8th Cir. 1923).

The burden rested on the respondent to overcome the presumption. Respondent discovered as early as June 3, 1974 that the principal place of business of petitioner was Carter Lake, Iowa. On that date at 1:30 P.M. respondent's counsel took the deposition of the President of petitioner in its office of Owen *in Carter Lake, Iowa* (A. 93-95). During that deposition the following questions were asked of Mr. Owen by respondent's counsel:

> "Q. And would you tell me where the headquarters of Owen Equipment and Erection Company is?
>
> A. Here, same headquarters.
>
> Q. Same headquarters.
>
> A. Yes. . . .
>
> Q. I have the impression in my mind's eye, and I don't know, that you have the headquarters at the same place and you have the same officers and it seems to be operated out of the same place. Is one company just the same as the other?" (A. 95).

On the 24th day of November, 1972 respondent filed her complaint wherein she alleged under paragraph 5 as follows:

> "That on January 18, 1972, plaintiff's decedent was employed working in the capacity of a machinist for

> the defendant, Paxton and Vierling Steel Company at *its place of business in Carter Lake, Iowa. . . .*" (Emphasis added.) (A. 5).

So on the 3rd day of June, 1974, respondent knew that it could not go forward with its burden of proving subject matter jurisdiction. However, the Eighth Circuit chose to believe that petitioner connived respondent and the trial court and concealed from both the principal place of business of the petitioner until the second day of trial.

Isn't it just as conceivable that the exact opposite conclusion could have been reached by the Eighth Circuit on these same facts? After June 3, 1974, it certainly would have behooved respondent to conceal the jurisdictional issue. Respondent had nothing to lose for the statute had already run. She could later claim tardiness when the petitioner raised the issue.

The 8th Circuit Court relies heavily on the case of *Di Frischai v. New York Central Railroad,* 279 Fed. 2d 141 (3rd Cir. 1960) as authority for its findings. In his treatise of Law of Federal Courts, Wright questions this decision stating:

> "This argument seems to assume that the court has discretion to hear a case where jurisdiction is not present, a very questionable assumption." Law of Federal Courts, Charles Alan Wright, West Publishing Co., 1970, page 17.

In *Eisler v. Stritzler,* 535 F. 2d 148 (1st Cir. 1976), the First Circuit addressed the *Di Frischia* case stating:

> "*Di Frischia v. New York Central R. Co., supra,* stands almost alone as a challenger to the traditional federal court practice. There the Third Circuit refused to permit a defendant, who had stipulated to

> the existence of diversity jurisdiction after having initially denied it, from moving to dismiss for want of jurisdiction two years after the action had been instituted. The court rested its decision principally on the ground that it would not allow a party to 'play fast and loose with the judicial machinery and deceive the courts.' *Id.* at 144. Little authority was cited to support the court's decision, and what little there was seems inapposite. Although we tend to agree that the *Di Frischia* rule is preferable to the present practice, we do not regard ourselves as free to adopt it. We note that *Di Frischia* has not proved to be a particularly generative inroad on the traditional rule, even in the Third Circuit. See *Joyce v. United States,* 474 F. 2d 215 (3d Cir. 1973); *Ramsey v. Mellon National Bank & Trust Co.,* 350 F. 2d 874 (3d Cir. 1965)."

II.

The basic elements of a full and fair "hearing" include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain, or rebut all such evidence.

Carter v. Kupler, 320 U. S. 243, 64 S. Ct. 1.

United States v. Dilman, 146 F. 2d 572 (5th Cir., 1945).

Petitioner respectfully submits that the United States Court of Appeals for the Eighth Circuit in its opinion filed June 21, 1977, made findings of fact which are not supported by the record on appeal and also made inferences of material facts which were not made by the trial court.

A finding was made concerning the conduct of petitioner when that issue was never before the trial court. The appellate court so concluded without giving petitioner an opportunity to introduce evidence at a properly conducted hearing, in violation of the due process clause of the 5th Amendment of the United States Constitution.

The court's opinion unequivocally claims petitioner has perpetrated acts of fraud, not only upon respondent but upon the Federal judicial system.

It is one thing for the trial court to assume jurisdiction where none in fact exists, yet it is still another for the Eighth Circuit to justify its holding by claiming fraud on the part of the petitioner. The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit. Yet, a finding was made on appeal that petitioner concealed the issue of diversity of citizenship until the statute of limitations had run so as to gain "a substantial advantage" over respondent. The factual findings, however, were not merely limited to a determination of concealment. The court elected to publish what it contended to be the strategy underlying this fictional tactic of concealment, without ever having had the advantage of evidence concerning the same.

> "By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly, or, indeed if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists it is clear to all that jurisdiction may be

> challenged by anyone at any time." (Appendix to Petition for Certiorari A. 22.)

The only issue before the trial court was that of whether pendant or ancillary jurisdiction existed. Respondent's counsel commented on the lateness of the petitioner's claim of no diversity of citizenship (A. 92-96).

Petitioner's attorney countered that argument and the court agreed. The colloquy between the court and counsel was as follows:

> "Mr. Johnson: Also in regard to his initial comment about our lateness in raising this, I would just say this—
>
> The Court: That can be raised at any time.
>
> Mr. Johnson: That is right. This is not an equitable case.
>
> The Court: That has been the rule since time began.
>
> (Page 207) Mr. Johnson: As to laches, estoppel or waiver, the Court either has it or it doesn't.
>
> The Court: The only thing that concerns me is this pendant or ancillary question . . ." (A. 96).

If the trial court had indicated during the trial that concealment was an issue, petitioner could have offered evidence in support of its innocence. But, the trial court emphasized that the only issue was the existence of pendant or ancillary jurisdiction.

The 5th Amendment to the Constitution of the United States of America guarantees the right of each party to examine, explain and rebut all evidence. In the case of *Carter v. Kupler*, supra, this court stated:

"Moreover, once a hearing has been ordered, § 75, sub. s(3), necessarily guarantees that it shall be a fair and full hearing. The basic elements of such a hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence. Tested by that standard, the personal investigation by the conciliation commissioner cannot be justified. It was apparently made without petitioner's knowledge or consent and no opportunity was accorded petitioner to examine or rebut the evidence obtained in the course of such inevstigation. The use of this evidence was therefore inconsistent with the right to a fair and full hearing."

The United States Court of Appeals for the Fifth Circuit in the case of *United States v. Dilman,* supra, extended the guarantee of the due process clause of the 5th Amendment of the Constitution to actions by a trial judge. In that case, the court stated:

"The basic elements of a full and fair hearing 'include the right of each party to the apprised of all the evidence upon which factual adjudication rests, plus the right to examine, explain or rebut all such evidence. Tested by that standard, the personal investigation by the conciliation commissioner (the trial judge here) cannot be justified.' Carter v. Kupler, 320 U. S. 243, 247, 64 S. Ct. 1, 3."

No evidence ever having been adduced on the issue of concealment in the instant matter by the trial and the trial court's insistence that concealment was not an issue, petitioner never had the opportunity to "examine, explain or rebut all such evidence."

Moreover, in the case of *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 125 (1969) this court stated:

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*"

And, in *Hodgson v. Okada,* 472 F. 2d 965 (10th Cir. 1973), the Tenth Circuit Court of Appeals further addressed that doctrine stating:

"It is not the function of the court of appeals to infer material facts. *Cross v. Pasley,* 267 F. 2d 824 (8th Cir. 1959). Nor may the appellate court make a controlling inference which the trial court has not made and which, if done, would in effect constitute a trial de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 89 S. Ct. 1562 (1969)."

The Eighth Circuit Court of Appeals, without the benefit of any evidence on the issue, inferred that petitioner intentionally concealed from the Court and the respondent the citizenship of petitioner. It is true that the trial court indicated that the delay in raising lack of diversity of citizenship was never explained. However, the trial court did not make any finding that there was intentional concealment. The Eighth Circuit, from the circumstances, inferred that there was intentional concealment even though the trial court failed to make any such inference. This is in effect a decision of a factual issue de novo in violation of the mandate of this court in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* supra.

III.

An independent basis of jurisdiction is required to support a plaintiff's claim against a third-party defendant.

United States v. Lushbough, 200 F. 2d 717 (8th Cir. 1952).

Fawver v. Texaco, Inc., 546 F. 2d 636 (5th Cir. 1977).

Saalfrank v. O'Daniel, 533 F. 2d 325 (6th Cir. 1976).

Aldinger v. Howard, 427 U. S. 1 (1976).

Kenrose Mfg. Co. v. Fred Whitaker Ford Co., 512 F. 2d 890 (4th Cir. 1972).

Kenrose Mfg. Co. v. Fred Whitaker Co., 53 F. R. D. 491 (1971).

Rivera Copper & Brass v. Aetna Casualty Co., 426 F. 2d 709, 12 A. L. R. Fed. 389 (5th Cir. 1970).

Palumbo v. Western Maryland Railway Company, 271 F. Supp. 361 (1967).

The trial court concluded in its memorandum overruling defendant's motion for dismissal for lack of subject matter jurisdiction filed on January 23, 1976, that:

> "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defendant is incorporated in the State of Nebraska and has its principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. Hence, an independent basis of jurisdiction does not exist." (A. 55).

There is no dispute that had the respondent originally sued Owen Equipment & Erection Company, Inc., there would be no diversity of citizenship and thus, no jurisdiction. However, the trial court held that under "the law in Nebraska", a plaintiff may assert a claim against the third-party defendant without an independent

basis of jurisdiction. As authority for its holding, the trial court cited cases of *Union Bank & Trust Co. v. St. Paul Fire & Marine Insurance Co.,* 38 F. R. D. 46 (D. Neb., 1965); *Olson v. United States,* 38 F. R. D. 489 (D. Neb., 1965); and *United Mine Workers of America v. Gibbs,* 383 U. S. 715 (1966).

The first case cited hereinabove does not serve as authority for the Trial Court's holding, for in that case, a claim was made by a third-party defendant against the plaintiff and it was decided that no independent jurisdictional base was required. This is, of course, substantially different than the instant matter where a plaintiff is making a claim against the third-party defendant. This distinction was pointed out in the case of *Rivera Copper & Brass v. Aetna Casualty Co.,* 426 F. 2d 709, 12 A. L. R. Fed. 389 (5th Cir. 1970). Therein, the Fifth Circuit Court of Appeals stated:

> "A cursory review of the joinder situations to which ancillary jurisdiction is applied reveals that generally, it is made available to litigants in a defensive posture, who would otherwise be prevented or greatly burdened in adequately protecting their interests. There is much to be said for allowing parties who are involuntarily brought into federal court to defend against a claim or who must be allowed to intervene in a federal action as a defendant to secure their interests, to assert all their claims arising out of the controversy in one proceeding and as this is, or ought to be, one of the factors to be considered in determining the existence of ancillary jurisdiction.
>
> . . .
>
> "Echoing Professor Moore, Revere argues that since there must be an independent ground of jurisdiction to support the original plaintiff's claim against

a third-party defendant, the same requirement must be met by the third-party defendant in asserting a counterclaim against the original plaintiff. *Suffice it to say that the two situations are the converse of each other only superficially and that there are differences which militate against identical treatment. First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can under the rules that forum provides, or defending himself not at all.* Since the plaintiff could not initially join a non-diverse defendant, it is arguable he should not be allowed to do so indirectly by way of a fortuitous impleader. Moreover, there is possibility, whether real or fanciful, or collusion between the plaintiff and an overly cooperative defendant impleading just the right third party." (Emphasis added.)

The differences are obvious. The Respondent here selected the forum, Petitioner did not.

The trial court cited as further authority for its holding that the law in Nebraska is that an independent basis of jurisdiction need not exist in order for a plaintiff to assert a claim against a third-party defendant, the case of *Olson v. United States,* supra. In that case, Judge Van Pelt chose to follow the minority rule and hold that an independent basis of jurisdiction need not exist before a plaintiff can assert a claim against a third-party defendant. It must be emphasized, however, that this minority stand has been taken by a very limited number of courts that have addressed the issue. Other cases which have commented on *Olson* have never followed this decision, but have only criticized it.

In *Kenrose Manufacturing Co. v. Fred Whitaker Co.,* 53 F. R. D. 491 (1971), the United States District Court for the Western District of Virginia stated:

> "On the other hand, there are a few cases which would not require the plaintiff to have an independent basis of jurisdiction in order to amend his complaint to include a third-party defendant with the same citizenship. *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. Neb., 1965). These cases regard a plaintiff's claim against a third-party defendant as ancillary to the original action. In *Buresch,* supra, Judge Gourley, Chief Judge of the Western District of Pennsylvania, felt that to deny ancillary jurisdiction in a case similar to the one at bar would defeat the purpose of avoiding multiplicity of suits and piecemeal litigation. In *Olson,* supra, Judge Van Pelt of the District Court of Nebraska stated that the fact that there may be collusion in some cases should not prevent plaintiffs from asserting their complaints against the third-party defendants in all cases. This minority view favoring expansion of ancillary jurisdiction to cover the situation at bar also has apparent support from some legal writers. See 6 Wright & Miller, Federal Practice and Procedure § 1444, p. 232 (1971); *Fraser,* supra, 33 F. R. D. at 41-43; *Holtzhoff,* supra, 31 F. R. D. at 110.
>
> "It should be noted, however, that there is still much disagreement on this point. For example, the *Buresch* decision originated from the Western District of Pennsylvania in 1968. Subsequent to that date two cases decided in that same district have rejected the view that no independent basis of jurisdiction is required. *Schwab v. Erie Lackawanna Railroad,* 303 F. Supp. 1398 (W. D. Pa., 1969); *Ayoub v. Helm's Express, Inc.,* 300 F. Supp. 473 (W. D. Pa., 1969) (Judge Weber, District Judge, Decided Both Cases)."

The *Kenrose Manufacturing Co. case* was appealed to the Court of Appeals for the Fourth Circuit. That appeal appears at 512 F. 2d 890 (4th Cir. 1972). That Court cited four cases as following the minority view. Those cases were: *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. C. Neb., 1965); *Myer v. Lyford,* 2 F. R. D. 507 (M. D. Pa., 1942); and *Skylar v. Hays,* 1 F. R. D. 594 (E. D. Pa., 1941). In discussing those cases that Court stated:

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks to avoid is available without question in the state courts. The majority view, as outlined above, has its own valid supporting reasons and we fail to discern any movement away from the well-established rule, which is directly contrary to appellant's contention.
>
> "It is true that four lower court cases have favored appellant's view. However, not only are these in the minority among the decided cases, but they have been far from convincing to other judges in the very jurisdictions where they were rendered."

In a footnote discussing how other judges have rejected the minority view, the Court stated:

> "For example, subsequent to the *Buresch* case, cited in note 9, two decisions issuing from the same court specificially rejected *Buresch.* See *Schwab v. Erie Lackawanna R. R.,* 303 F. Supp. 1398 (W. D. Pa. 1969), and *Ayoub v. Helm's Express, Inc.,* 300 F. Supp. 473 (W. D. Pa. 1969). In *Ayoub,* the Court said:

> " 'There is no diversity of citizenship between the plaintiff and the present third-party defendant against whom plaintiff wishes to assert a direct claim. The great weight of authority requires that there be diversity of citizenship between such parties. Although such a claim was allowed to be asserted in *Buresch* • • • I do not believe that this opinion represents the view of a majority of the members of this District Court or the view of the majority of the federal courts.' "

In the case of *Palumbo v. Western Maryland Railway Company,* 271 F. Supp. 361 (1967), Chief Judge Thomsen of the United States District Court for the District of Maryland, commented on Judge Van Pelt's holding in *Olson v. United States* in light of the comments of the Advisory Committee on the Federal Rules of Civil Procedure and existing case law. Judge Thomsen stated:

> "When Rule 14 was first adopted, Professor Moore expressed the opinion that independent grounds of jurisdiction would be required to support a plaintiff's claim against a third-party defendant, and most of the courts have taken that view. See **3A Moore's Federal Practice,** 2d ed., p. 24.27(I) and cases cited therein. In Friend v. Middle Atlantic Transp. Co., 153 F. 2d 778 (2d Cir. 1946), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 1635, Judge Clark, speaking for the Second Circuit (as well as out of his experience as Chairman of the Advisory Committee on Rules) said:
>
> " 'May a defendant cause a third party to be brought into a federal civil action under Federal Rules of Civil Procedure, Rule 14, 28 U. S. C. A following section 723c, to answer, along with it, to the plaintiff's claim, where the plaintiff and such party are citizens of the same state and federal jurisdiction does not otherwise appear? That is the issue squarely presented here, and we

think it must be answered in the negative. Notwithstanding the undoubted convenience of extensive joinder in cases such as this, we must observe the established boundaries of federal jurisdiction, which the rules do not enlarge. F. R. 82, 153 F. 2d at 779.

"When Rule 14 was amended in 1948, the Advisory Committee noted that 'in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. The note referred to a number of cases and commentators. Since the amendment, the weight of authority has continued to require independent grounds of jurisdiction for such a claim. Moore, op. cit., p. 14.17(1).

"Judge Van Pelt assembled all the arguments to the contrary in his opinion in Olson v. United States. 38 F. R. D. 489, 490 (D. Neb. 1965), and refuses to follow the majority view. He noted that some courts have expressed 'the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of a third-party practice.' Fear of collusion is not the principal argument supporting the majority rule. Wherever the law provides for contribution among joint tortfeasors, or a defendant has a possible claim for indemnity, the defendant will ordinarily file a third-party complaint, giving plaintiff the opportunity to assert a claim against the third-party defendant.

"The principal reason for the majority rule was tersely stated in McPherson v. Hoffman, 275 F. 2d 466 (6 Cir. 1960), as follows:

> " 'Under the Federal Employers' Liability Act the plaintiff could bring his action against the railroad in Federal Court without diversity of citizenship. Section 56, Title 45, U. S. C. A. He could not have sued the McPhersons in Federal Court separately nor could he have joined them with Chesapeake and Ohio because there was no diversity of citizenship between him and the McPhersons, Section 1332, Title 28, U. S. C. What he could not do directly could not be done for him indirectly. The court did not have jurisdiction to enter a judgment against third-parties defendant in favor of the plaintiff Hoffman. Jurisdiction cannot be waived.' 275 F. 2d at 470."

Moreover, in one of its prior decisions the 8th Circuit chose to follow the majority rule and hold contrary to the ruling of Judge Van Pelt in *Olson v. United States,* supra.

In the case of *United States v. Lushbough,* 200 F. 2d 77 (8th Cir. 1951), plaintiff Lushbough brought an action under the Federal Tort Claims Act against the United States for damages he sustained in an automobile collision. The United States impleaded Hoffman as a third-party defendant, stating he was liable over to the United States for any judgment Lushbough might obtain against it. The District Court found that Hoffman's negligence was the cause of the collision and entered a judgment in favor of the plaintiff Lushbough against the United States and against Hoffman in the sum of $50,000.00. The District Court also awarded judgment against Hoffman on the third-party complaint of the United States. Both the United States and Hoffman appealed from the judgment in favor of Lushbough. This Court in reversing the judgment in favor of Lushbough against Hoffman stated:

> "We think the judgment against Hoffman in favor of Lushbough must also be reversed. Lushbough

brought no action against Hoffman, asked for no judgment against him. Rule 14(A) of the Rules of Civil Procedure, 28 U. S.C. provides that: 'The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.' Lushbough asserted no claim against Hoffman. But, conceding for the argument that such an assertion was a formality not required under the Federal Rules of Civil Procedure, Lushbough's right to maintain a claim against Hoffman is prohibited by 28 U. S. C., Section 2676, which provides:

> " 'The judgment in an action under Section 1346(B) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.'

"The District Court, having awarded a judgment in favor of Lushbough in his action against the United States, could not in the face of the explicit provisions of the Act order judgment against Hoffman in favor of Lushbough in the same action. Prechtl v. United States, D. D. 84 F. Supp. 889, 890; Lauterbach v. United States, D. C. 95 F. Supp. 479, 482. *Nor is there any showing in the evidence of the necessary diversity of citizenship as between Lushbough and Hoffman.* Since the reversal of the judgment against the United States carries with it the reversal of the judgment for the United States against Hoffman, it is unnecessary to consider Hoffman's contention that the United States could not implead Hoffman as a third-party defendant in the action." (Emphasis added.)

In *Kenrose Manufacturing Co. v. Fred Whitaker Co., supra,* the United States Court of Appeals for the Fourth Circuit set forth the majority view on the subject, stating:

"Rule 14 of the Federal Rules of Civil Procedure governs third-party practice and it has indeed been held under that rule that, where there is diversity as between plaintiff and defendant, defendant may implead a third party of the same citizenship as the plaintiff. In such case, it may be said that ancillary jurisdiction confers power upon the court over the third-party action.

"Rule 14 also contains language permitting a plaintiff to

> Assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

There is, however, no indication in the rule whether a basis of jurisdiction independent of the main action must be alleged to support plaintiff's claim against the third-party defendant. Where jurisdiction does not otherwise appear, mere permission, in the rules, to assert a claim, does not itself confer jurisdiction over that claim. By express provision the rules are not to be read as a source of jurisdiction. See Rule 82. To illuminate this point, we must necessarily look elsewhere.

"Many courts have considered whether an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim. See, e. g., Stemler v. Burke, 344 F. 2d 393, 395-396 (6th Cir. 1965); McPherson v. Hoffman, 275 F. 2d 466, 470 (6th Cir. 1960); Patton v. B & O R. R. Co., 197 F. 2d 732, 743 (3rd Cir. 1952); *United States v. Lushbough,* 200 F. 2d 717, 721-722 (8th Cir. 1952); Friend v. Middle Atlantic Transportation Co., 153 F. 2d 778, 779-780 (2nd Cir.), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 2d 1635 (1946); Corbi v.

United States, 298 F. Supp. 521 (D. C. Pa. 1969); Palumbo v. W. Md. Ry. Co., 271 F. Supp. 361 (D. C. Md. 1967).

"Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule prevents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation." (Emphasis added.)

Even Judge Van Pelt acknowledged the ruling of the majority, yet for some reason failed to follow it. He stated:

"A number of courts have been impressed with the fact that by not requiring diversity, the plaintiff could assert a claim against a party whom he could not have sued directly in the federal courts without independent jurisdictional grounds. David Crystal, Inc. v. Cunard S. S. Co., 223 F. Supp. 273 (S. D. N. Y. 1963); LaChance v. Service Trucking Co., 208 F. Supp. 656 (D. Maryland 1962); Pasternack v. Dalo, 17 F. R. D. 420 (W. D. Pa. 1955); Welder v. Washington Temperance Ass'n, 16 F. R. D. 18 (D. Minn. 1954); (Dictum) *United States v. Lushbough,* 200 F. 2d 717, 721 (8th Cir. 1952); Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E. D. N. Y. 1941). The same decisions express the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of third party practice." (Emphasis added.)

The trial court in its Memorandum addressed to the petitioner's motion to dismiss for lack of subject matter jurisdiction (A. 54), stated that the rule that an independent basis of jurisdiction need not exist in order for the plaintiff to assert a claim against a third-party defendant was once a minority view, but that the trial court believed it to be correct.

Petitioner emphasizes that this still clearly remains the minority view. No court of appeals in any circuit in the Federal Judicial System has ever followed the minority view, and, in fact, those addressing the issue have criticized and dismissed the minority view as being contrary to the intent and purpose of the Federal Rules and certainly, contrary to the comments of the Advisory Committee concerning Rule 14.

Judge Bright, in his dissent emphasizes that this is still a minority rule. His comments were as follows:

"As Judge Smith correctly observes, *supra* at 12 and 14 n. 25, citing *Fawvor v. Texaco, Inc., supra,* 512 F. 2d 890, the majority of federal courts support the view that an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. It also appears that we are the first court of appeals to rule to the contrary. In addition to the cases cited by the majority, see *Saalfrank v. O'Daniel,* 533 F. 2d 325 (6th Cir.), *cert. denied sub. nom. Saalfrank v. Parkview Mem. Hosp.,* 429 U. S. 922 (1976); *Rosario v. American Export-Isbrandtsen Lines, Inc.,* 531 F. 2d 1227, 1233 and n. 17 (3d Cir.), *cert. denied sub. nom. Rosario v. United States,* 429 U. S. 857 (1976). Thus, I would conclude that Congress did not intend that federal courts take

jurisdiction over a plaintiff's claim against a third-party defendant, in the absence of independent jurisdictional grounds."

In *Aldinger v. Howard*, 96 S. Ct. 2413 (1976), this Court addressed the question of whether a plaintiff who asserted a claim against one defendant could implead a different defendant on a state law claim where there is no independent basis of federal jurisdiction, merely because the claim of the plaintiff against both defendants "derived from a common nucleus of operative fact."

In an opinion by Mr. Justice Renquist, this Court stated:

"The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. *But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.' Ibid.* True, the same considerations of judicial economy would be served insofar as plaintiff's claims 'are such that he would ordinarily be expected to try them all in one judicial proceeding . . . ' Ibid. *But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.* We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, 512 F. 2d 890, 894 (C. A. 4, 1972):

"'The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence of absence of jurisdiction. Especially is this true where as here the efficiency plaintiff seeks so avidly is available without question in the state courts.'" (Emphasis added.)

This Court quoted with approval the language of Judge Sobeloff in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, supra. That case was cited extensively by appellant in its original brief filed herein. This Court emphasized that "the addition of a completely new party would run counter to the well-established principle that federal courts as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by the Congress." In the words of Judge Sobeloff in the *Kenrose Mfg. Co., Inc.* case, "the efficiency the plaintiff seeks so avidly is available without question in the state courts."

Aldinger holds that where jurisdiction is based not on diversity of citizenship but on a federal statute otherwise conferring jurisdiction over the subject matter, a claim based on state law against an entirely different defendant over which there is no independent basis of federal jurisdiction will only be allowed where the Court satisfies itself (1) that Art. III of the United States Constitution permits it and (2) that "Congress in the

statutes conferring jurisdiction has not expressly or by implication negated its existence." But jurisdiction does not exist in a factual situation such as that which is before the Court in the instant matter. It is stated in *Aldinger*:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of the state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derived from a common nucleus of operative fact.' "

This Court then emphasized:

> "That the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress."

This is especially so where the plaintiff may seek his remedy in the state court. In the instant matter, respondent's remedy was available in the state court. There was no jurisdiction.

In the case of *Fawvor v. Texaco, Inc.*, 546 F. 2d 636 (5th Cir. 1977) the Fifth Circuit Court of Appeals construed the case of *Aldinger v. Howard,* supra. Relying on that decision plus the decision of the Fourth Circuit in

Kenrose Manufacturing Company, Inc. v. Fred Whitaker Co., Inc., supra, the court stated:

> "The authorities and cases cited above convince this Court that an independent ground of jurisdiction is necessary in order to support plaintiff's claim against the third-party defendant. No questions of federal law are involved in either the original action or in plaintiff's action against the third-party defendant. The basis of jurisdiction in the original complaint is diversity, but no diversity exists between the plaintiff and the third-party defendant. Neither is there any other basis for the federal court's assertion of jurisdiction over plaintiff's direct claim against the third-party defendant. This is not a situation where the same plaintiff and defendant seek to join a state claim with a federal claim. Although it is true that the defendant-third-party plaintiff has already brought in the third-party defendant, the defendant-third-party plaintiff had no choice as to forum, and neither did the third-party defendant. Not only did plaintiff have its choice of forum, but in fact it could and did file the same action in state court. The Constitution, statutes, rules of procedure, judicial precedent and public policy dictate that this Court not broaden the jurisdiction of the federal courts any more than that clearly permitted by law. Therefore, this Court concludes that an independent basis of jurisdiction is necessary for a plaintiff in a diversity action to assert a non-federal claim against a non-diverse third-party defendant."

Other district courts sitting in the Eighth Circuit have chosen to follow the majority rule. For example, in *Welder v. Washington Temperance Association,* 16 F. R. D. 18 (1954), the United States District Court for the District of Minnesota, Second Division, stated:

> "The interpleading of the third-party defendant brought in the plaintiff's amended complaint places

residents of Minnesota on both sides of the case, thereby destroying the basis of this court's jurisdiction.

"Rule 14 of the Federal Rules of Civil Procedure, 28 U. S. C. A., was intended to avoid delay and multiplicity of actions and should be liberally construed, but not to the extent of permitting such construction to extend the jurisdiction of the court. What plaintiff proposed to accomplish by his amended complaint was in effect to substitute another cause of action for that originally commenced by him. This he cannot do."

IV.

Dismissal of all federal claims before trial requires dismissal of state claims as well.

United Mine Workers of America v. Gibbs, 383 U. S. 715 (1966).

Kenrose Manufacturing Co. v. Fred Whitaker Co., 53 F. R. D. 491 (1971).

Municipal Leasing System, Inc. v. Northampton National Bank of Easton, 382 F. Supp. 968 (1974).

Andrews v. Central Surety Insurance Company, 295 F. Supp. 1223 (1969).

Gibson v. First Federal Savings and Loan Association of Detroit, 504 F. 2d 826 (1974).

Kurtz v. State of Michigan, 548 F. 2d 172 (6th Cir. 1977).

Hodge v. Mountain State Tel. & Tel. Co., 555 F. 2d 254 (9th Cir. 1977).

But even if it be assumed that the minority view is correct, the jurisdictional limit of a federal district court had never been extended to that which it has in the present action. The trial court acknowledged that:

> "This case is nevertheless novel, in that the third-party plaintiff was dismissed." (A. 56)

The holding of the trial court in this matter is likewise novel in finding that jurisdiction existed between citizens of the same state in the Federal Court, where no federal question was presented and the main cause of action between plaintiff and defendant, OPPD, had been dismissed prior to trial at defendant's request. Prior to the trial court's decision, jurisdiction has never been allowed to exist in a similar situation. The trial court stated:

> "However, having determined that ancillary jurisdiction exists, it is only equitable that the court now retain jurisdiction of this 'pendent' claim." (A. 56)

In *Kenrose Manufacturing Co. v. Fred Whitaker Co.*, 53 F. R. D. 491 (1971), the plaintiff attempted to make a claim against the third party defendant. The Court stated:

> "This court agrees with the majority view that when plaintiff amends his complaint to assert a direct claim against a third-party defendant of the same citizenship as plaintiff, there no longer exists diversity with regard to the main action. Furthermore, this court feels that diversity existing between an original plaintiff and a defendant is required to support any claims based on ancillary jurisdiction. Since that diversity was destroyed when the plaintiff amended his complaint to assert a claim against a co-citizen there no longer exists a basis for utilizing ancillary jurisdiction."

The Court in *Kenrose* then emphasized the distinction between the case which was before it and the cases following the minority views stating:

"*Furthermore, in the case at bar, the third-party plaintiff has voluntarily moved to dismiss his third-party complaint against Kilodyne. This court is of the opinion that this factor distinguishes this case from the cases following the minority view, in that, in those cases the third-party complaint was not withdrawn but remained in the action.* By analogy, this court finds that the principle laid down in the case of State of Maryland to Use and Ben. of Wood v. Robinson, 74 F. Supp. 279 (D. Md., 1947), applies to the case at bar. *Robinson,* supra, involved an action by Virginia plaintiffs and the Maryland defendant, parties to the main action, settled their dispute out of court. Afterwards, the third-party defendants filed a motion to dismiss the third-party complaint for lack of diversity of jurisdiction. The Court, in granting that motion, rejected the general proposition that once jurisdiction properly attaches, it will not ordinarily be defeated by changes in situation.

"In the case at bar, this Court feels that the same principles should apply. *Since the third-party plaintiff has voluntarily moved for a dismissal of its claim against the third-party defendant, and that motion has been granted, the basis for allowing a direct complaint by the plaintiffs against Kilodyne, without an independent basis of jurisdiction, no longer exists.* That third-party complaint was the only foundation upon which the plaintiff could, relying on the minority view, support his claim that no independent basis of jurisdiction is necessary. For the above reasons, this Court feels that it is without jurisdiction to decide the plaintiff's amended complaint against Kilodyne, Inc." (Emphasis added.)

In the case of *Municipal Leasing System, Inc. v. Northampton National Bank of Easton,* 382 F. Supp. 968 (1974), the United States District Court for the Eastern District of Pennsylvania, Judge VanArtsdalen stated:

"Count IV 'alleges liability and seeks relief pursuant to the ancillary jurisdiction' of the court. In plaintiff's brief, it is conceded that this count, depending on ancillary jurisdiction is only maintainable if there is some independent basis for federal jurisdiction arising out of one or more of the other counts. The count apparently charges that the defendant bank improperly made charges against plaintiff's bank account, refused to honor certain checks drawn against the account and in other ways 'mishandled' plaintiff's bank account. This is purely a matter for state court determination. There being no diversity jurisdictional basis, *and in view of the dismissal of all other counts,* **this cause of action must likewise fail."** (Emphasis added.)

In the case of *Andrews v. Central Surety Insurance Company,* 295 F. Supp. 1223 (1969), the United States District Court for the District of South Carolina, Judge Simons, stated:

"The ancillary jurisdiction of the federal courts recognized by the foregoing authorities would not extend to a situation *where the main suit had been fully concluded and there were no assets actually or constructively within the court's possession and control as a result of the principal suit.* Such was the case in Bounougias v. Peters, 369 F. 2d 247 (7th Cir. 1966). In that case the original tort action filed and tried in the federal district court in connection with Bounougias' injuries had been completely terminated and its judgment satisfied and all funds distributed before the attorney's suit for his fee was commenced. The court held under such circumstances that the district court had no jurisdiction since 'the district court had no property connected with this litigation in its custody or control.'" (Emphasis added.)

In denying Petitioner's motion for dismissal on the basis of lack of subject matter jurisdiction, the trial court

also relied on the case of *United Mine Workers of America v. Gibbs,* 86 S. Ct. 1130, 383 U. S. 715 (1966). The trial court quoted from Moore's Federal Practice, stating:

> "Properly read, *United Mine Workers* [*v. Gibbs,* 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case,* i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27[1], 14-569 to 14-570."

However, in *Gibbs* this Court was dealing with pendent jurisdiction and not with the question of ancillary jurisdiction.

In the case of *Saalfrank v. O'Daniel,* 553 F. 2d 325 (6th Cir. 1976) Judge Lively, writing on behalf of the 6th Circuit stated:

> "Strictly speaking, a case such as the present one involves ancillary, rather than pendent jurisdiction. See *Wright,* Law of Federal Courts (2nd Ed.) at 65. *Mineworkers v. Gibbs,* supra, was concerned with pendent jurisdiction only. The Supreme Court does not appear to have decided whether the doctrine of ancillary jurisdiction empowers a federal court to decide a direct claim by a plaintiff against a non-diverse third-party defendant in the absence of an independent jurisdictional basis."

But the approach of this Court in *Gibbs* is indeed pertinent to the plea of the petitioner in this action. It is true that in *Gibbs* this Court stated that if the federal and state claims "derive from a common nucleus of operative fact"; if the plaintiff would ordinarily be expected to try all of his claims in one judicial proceeding; and, if the federal issues are substantial in character, then there is power in the federal court to hear all such claims. The *Gibbs* opinion indicated, however, that such power is not required to be exercised in every case even though it is found to be in existence. Therefore, pendent jurisdiction is a "doctrine of discretion not of plaintiff's right." This Court then stated:

> "Its justification lies in considerations of judicial economy, convenience, and fairness to litigants; if these are not present, a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply State law to them, *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, but procuring for them a surer-footed reading of applicable law. *Certainly, if the Federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."* (Emphasis added.)

This statement has been consistently construed to limit the discretion of the district court.

In the recent case of *Gibson v. First Federal Savings & Loan Association of Detroit,* 504 F. 2d 826 (1974), the United States Court of Appeals for the Sixth Circuit rigidly applied this Supreme Court mandate. The Court stated therein:

> "In the absence of a substantial federal claim related to asserted state claims in such a way that the entire case may properly be deemed one 'case', federal courts do not have jurisdiction over purely state claims. *United Mine Workers of America v. Gibbs,*

383 U. S. 715, 725, 86 S. Ct. 59, 15 L. Ed. 2d 58 (1966). *Dismissal of all federal claims before trial requires dismissal of state claims as well. Id* at 726, 86 S. Ct. 59. A state court is the proper forum for adjudication of issues of general law, particularly where questions of fiduciary relationships are involved." (Emphasis added.)

See also *Kurtz v. State of Michigan,* 548 F. 2d 172 (6th Cir. 1977) wherein the Court stated:

> "Since all portions of the claims in this cause of action which arise under federal law have now been dismissed, the state law claims are no longer pendent and must be dismissed likewise. See *United Mine Workers v. Gibbs* . . ."

and, *Hodge v. Mountain States Tel. & Tel. Co.,* 555 F. 2d 254 (9th Cir. 1977), wherein the Ninth Circuit Court stated:

> "When a district court dismisses all federal claims prior to trial, it should not retain jurisdiction over pendent state claims."

The Eighth Circuit, however, claims dismissal of the federal claims prior to trial "is but one factor, among many others, to be considered" by the Court in exercising its discretion to retain jurisdiction of state law claims.

If, as the Court in *Kenrose* stated, the dismissal prior to trial of the defendant with whom an independent basis of jurisdiction existed, does distinguish those cases following the minority view from those adhering to the majority view, it is then of great import to note that the Defendant OPPD was not dismissed from this action until October 1, 1975 (A. 41), after the statute of limitations had run. Petitioner certainly could not control the dismissal of the

defendant OPPD by the trial court and could not insist that OPPD be dismissed prior to the running of the statute of limitations, so that it could assert its claim that no independent basis of jurisdiction existed between respondent and petitioner based on the distinction of *Kenrose.*

CONCLUSION

Subject matter jurisdiction does not exist in this case. The petitioner and respondent are both citizens of the State of Iowa and thus there is no diversity of citizenship between the parties. An independent basis of jurisdiction is required to support a claim by a plaintiff against a third-party defendant, especially where all federal claims are dismissed from an action before trial so should all state claims be dismissed from an action. The only non-diverse defendant, OPPD, was dismissed prior to trial leaving an Iowa plaintiff to litigate a state law claim against an Iowa defendant.

Jurisdiction cannot be created by waiver, estoppel, consent, stipulation or discretion. *United Mine Workers v. Gibbs,* supra, does not touch ancillary jurisdiction, but rather deals with pendent jurisdiction and did not provide the trial court with the power it needed to render a judgment in this matter. Nor did the conduct of the petitioner estop it from asserting lack of subject matter jurisdiction. The petitioner did nothing other than answer in conformance with the provisions of Rule 8 of the Federal Rules of Civil Procedure. The respondent had access to information equal to that of the petitioner at early stages of

the proceeding which would have advised respondent of petitioner's principal place of business.

The respondent never directed interrogatories to the defendant until June 17, 1974, after the statute of limitations had run; and, even in those interrogatories, respondent failed to ask petitioner its principal place of business. The burden of proving the existence of diversity of citizenship and therefore subject matter jurisdiction was on respondent. Respondent was the one attempting to exert the existence of federal jurisdiction. In light of the rule that there is a presumption against the existence of federal jurisdiction, respondent was ladened with an even greater burden of proof in that regard. Yet, the respondent failed to come forward with evidence to satisfy that burden.

Petitioner therefore respectfully requests that this court find that the trial court did not have the power to hear this matter since subject matter jurisdiction did not exist and reverse the judgment of the circuit court and dismiss for lack of jurisdiction.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,
Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,
Respondent.

Brief of Respondent on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

INDEX

Cases Cited

INDEX—Continued

Texts Cited

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STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case as far as it goes and for the purpose of brevity incorporates by reference in addition thereto the factual history of the case as is contained in the opinion of the Court of Appeals in Judge Talbot Smith's review of the

facts as found in Appendix A and with which the petitioner has expressed no disagreement.

In addition thereto, feeling that petitioner has inadvertently transposed the chronological sequence of events in a manner that confuses rather than clarifies, respondent offers the following timetable of the history of the litigation for the convenience and assistance of the Court with emphasis supplied.

Timetable

January 18, 1972	Accident and death of Kroger.
November 24, 1972	Plaintiff's complaint was filed against Omaha Public Power District.
August 24, 1973	Omaha Public Power District filed a third party complaint against *Owen Construction Co., Inc.*
September 7, 1973	Omaha Public Power District filed motion for voluntary dismissal of Owen Construction Co., Inc., asking leave to file an amended third party complaint against Owen Equipment and Erection Company.
September 7, 1973	The Court entered an order pursuant to the motion ordering: "That third party Defendant, Owen Construction Co., Inc., *an Iowa Corporation,* should be and hereby is dismissed from this action, with prejudice.

IT IS FURTHER ORDERED that the defendant and third party plaintiff should be and hereby is granted permission to file an amended Third Party Complaint naming Owen Equipment and Erection Co., *a Nebraska Corporation,* as an additional third party defendant in this action."

September 11, 1973	Omaha Public Power District filed a Third Party Complaint against Owen Equipment and Erection Co. describing such company as *"a Nebraska Corporation."*
September 8, 1973	Plaintiff filed motion to add a party defendant, Owen Equipment and Erection Co., *a Nebraska Corporation.*
October 15, 1973	Owen Equipment and Erection Company filed an answer to the third party complaint filed by Omaha Public Power District in which it "Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the *State of Nebraska*" and denied generally all other allegations.
October 30, 1973	Omaha Public Power District filed motion for summary judgment.
November 9, 1973	Plaintiff filed amended complaint against Owen Equip-

	ment and Erection Co. describing it in caption as a *"Nebraska Corporation."*
November 27, 1973	Owen Erection & Equipment Co. filed an answer to plaintiff's complaint admitting that it was a corporation "organized and existing under the laws of the *State of Nebraska"* coupled with a general denial of the allegations of plaintiff's amended complaint.
January 18, 1974	*Iowa Statute of Limitation runs on state cause of action.*
February 12, 1975	Final judgment was entered in favor of Omaha Public Power District against the plaintiff.
February 14, 1975	Argument in Court of Appeals.
October 1, 1975	Judgment affirmed by United States Court of Appeals, Eighth Circuit.
November 14, 1975	A motion for summary judgment filed by Owen Equipment & Erection Co. against plaintiff (which had been filed September 24, 1974) was heard on depositions, affidavits and interrogatories and denied by the Court. Nowhere in either the motion for summary judgment or in the evidentiary hearing on the motion did Owen Equipment & Erection Co. raise any issue of jurisdiction or claim a lack of diversity or adduce facts as to where

	its claimed principal place of business might be.
January 12, 1976	Trial commenced and a jury was empaneled.
January 13, 1976	Plaintiff's evidence was adduced.
January 14, 1976	Just before noon the attorney for Owen Equipment & Erection Co. asked the witness Petersen, secretary of Owen Equipment & Erection Co., an adverse witness called by plaintiff, if the principal place of business of the defendant was in Carter Lake, Iowa, and received an affirmative reply. Shortly after one o'clock p.m., on the third day of trial, defendant raised lack of diversity.

Comment: It will be noted from the above, that at the time the statute of limitations of Iowa ran on the cause of action under state law on January 18, 1974, all three parties were without question proper parties in litigation under Rule 14 subject to the jurisdiction of the United States District Court for the District of Nebraska, and all three parties remained so until October 1, 1975, when the summary judgment in favor of the third-party plaintiff was affirmed by the Court of Appeals.

A brief word about the situs of the events involved seems appropriate. It is a small piece of land on the west side of the Missouri River. Traditionally, it is believed that this great river clearly marks the boundary between

the states of Nebraska and Iowa; indeed, all but limited local maps show it to be. However, many years ago, that river avulsed at one of its bends and left a small piece of land on the west side of the river that remains Iowa. A small strip of Nebraska actually lies east of a strip of Iowa. The exact boundary lines in this geographical no-man's land are mostly unmarked and confusing. Several Omaha, Nebraska companies, including the petitioner in this case, own and maintain facilities in the area, some of them being on Iowa land, although they are Nebraska corporations. It has been the bane of map makers and law enforcement officers.

The respondent's decedent, the respondent and their family were residents of Iowa but living west of the Missouri River. The petitioner was and is a Nebraska corporation owning two large, heavy duty cranes which are mobile and operate in both states in areas completely west of the river. These constitute the sole physical assets of petitioner. (C. of A. App. 110 & 130.)

Through the negligence of the petitioner, the Owen Equipment and Erection Company, a Nebraska corporation, plaintiff's husband was killed by electrocution when standing near one of the petitioner's large cranes which was swung into an overhead high tension line, installed by the Omaha Public Power District of Nebraska (OPPD). No complaint is still made that the respondent's decedent was anything but an innocent victim of the negligence of the petitioner nor that the verdict was excessive in any way.

SUMMARY OF ARGUMENT

The argument of the respondent will discuss the following contentions:

1. The judgment below in favor of the respondent against the petitioner was just and a result to the contrary would have been unconscionable and that petitioner suffered no prejudice by being tried in federal as opposed to state court. While this statement at this appellate level may seem naive, respondent still believes that all else being equal it is a factor to be considered even in the most prestigious and sophisticated court in the world.

2. An affirmance based on a finding that in this particular case the trial court had the *power* to retain the case for ancillary disposition would in no way expand the jurisdiction of the federal courts or invite an increase in federal court litigation. To the contrary, an opinion delineating and limiting the factual situations wherein discretionary retention of ancillary jurisdiction should be exercised may well serve as a compendium of direction and accomplish an opposite result.

3. At the time Hon. Robert V. Denney, United States District Judge for the District of Nebraska, toward the end of the trial itself, elected to exercise his discretion to retain the cause for disposition, he based his decision on *United Mine Workers of America v. Gibbs,* 393 U.S. 715; two decisions of the highly respected Nebraska judge, Hon. Robert Van Pelt in *Olson v. United States,* 38 F.R.D. 285 and *Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.,* 38 F.R.D. 486 (D. Neb. 1965); and the Second Edition of Professor *Moore's Federal Practice* (A. 60-62). In so doing, respondent contends Judge Denney was acting within his *power* and to have exercised his discretion in favor of a dismissal would have been an abuse of that discretion under the facts and circumstances of the case before him.

4. Respondent will further argue that the answer of petitioner filed *before* the Iowa statute of limitations had run, operated as a concealment of the possible jurisdiction question and was in violation of the purpose and intent of Fed. R. Civ. P. 8(b).

5. Respondent will discuss the pendent jurisdiction case of *Aldinger v. Howard,* 427 U.S. 1; 96 S. Ct. 2413 as being some indication on the part of the Court of understandable reluctance to bind the Federal judiciary to a hard, fast and inflexible course of conduct under rules involving either ancillary or pendent jurisdiction, particularly in cases where no new party has been added by the plaintiff and where plaintiff's claim against a third-party defendant, when filed, constituted a claim between parties already within the jurisdiction and power of the court, the non-retention of which would result in high injustice.

6. Respondent will further show (although there is no claim to the contrary) that no collusion existed between the respondent and the original defendant-third-party plaintiff, the record indicating that the dismissal of the original defendant was opposed by respondent all the way through the Court of Appeals (*Kroger v. Omaha Public Power District,* 523 F. 2d 161).

7. Petitioner's claims that its Fifth Amendment rights were violated by all three judges of the Court of Appeals by being interrogated by them in the courtroom regarding the case will also be discussed by respondent in the argument.

ARGUMENT

Once a federal court has before it all the parties to the controversy, sharing common and interrelated facts, it has the power in the jurisdictional sense, to dispose of the case and dismissal of the main action does not require dismissal of the third-party action, even though no independent grounds of jurisdiction may exist.

Petitioner's brief creates the impression that the jurisdiction in dispute here arises solely from the provisions of Rule 14 and that the court is being asked to stretch the rule to extend jurisdiction.

The Second Circuit in *Dery v. Wyer* explains the relationship between Rule 14 and the general subject of federal jurisdiction as follows:

> Rule 14 does not extend jurisdiction. It merely sanctions an impleader procedure which rests upon the broad conception of a claim as comprising a set of facts giving rise to rights flowing both to and from a defendant. For solution of the incidental jurisdictional problems which often attend utilization of the procedure, the concept of ancillary jurisdiction, which long antedated the Federal Rules, may often be drawn upon. (*Dery v. Wyer,* 265 F. 2d 804, C. A. 2d, 1959.)

In addition to the right of a defendant to implead a third-party defendant, a plaintiff may assert a claim against such third-party defendant if that claim arises out of the transaction that is the subject matter of plaintiff's claim against the original defendant. Since the plaintiff's claim against the third-party defendant arose out of a transaction that is already before the court, and since the third-party defendant was already a party

before the plaintiff asserted her claim against it, the court had jurisdiction, or the power, if you will, to hear it even though there is no independent basis of federal jurisdiction between the plaintiff and the third-party defendant.

This, of course, is respondent's contention herein.

The right to hear the action out after dismissal of the original defendant arises out of the *power* of the court acquired at the time all three parties were before it. However, that power is susceptible to being exercised only in proper circumstances in the discretion of the court, and it may be withheld if not warranted by the facts.

It is respondent's position that the exercise of the court's discretion in that regard in this particular case was fully proper and wholly justified and did not constitute an abuse of discretion by that court.

It would be of dubious value to present a roll call of the circuits since *Gibbs* on questions of ancillary and pendent jurisdiction. To add to such a roll call the numerous decisions both ways at District court levels since 1966 would lengthen respondent's brief without justification. Neither would it profit anyone to debate whether such post-*Gibbs* swing by those courts that have changed favors the so-called minority rule over the so-called majority rule.

The fact of disagreement is presumably why we are here.

With the writings on the subject, by Moore, Wright, Miller, Hart, Wechsler and Fraser, it would be presumptuous for this advocate to attempt to add some new juris-

dictional philosophy to that already accumulated. To respondent's knowledge, the section entitled "*Third-Party Claims*" in *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims,*" Fraser, 1978, 76 F.R.D. 525 at pp. 535-546 is the most recent updating of decisions on the subject, its publication being in the February, 1978 issue.

A further difficulty that arises in connection with any attempt to analyze lower court decisions is the fact that at a district court level, if the action is dismissed at a pre-trial stage, the probability is that the state court remedy still is available and rather than take the time and chance of an appeal, during which the state statute of limitations may run, the dismissed out party would simply file the state court action. Respondent had no such alternative. All three parties were in federal courts for over a year and eight months after the state statute had run.

Petitioner in effect demands a rule of total inflexibility as a means of prevailing under the facts of this case. Total inflexibility could, in a given case, be tantamount to total injustice. We submit it is devoutly to be avoided.

Wright & Miller, *Federal Practice and Procedure,* Sec. 1444, pps. 221-2, phrases it more adequately:

> "But the amorphous character of the ancillary jurisdiction must always be kept in mind. Its application in a particular case cannot be determined simply by referring to a statute or resorting to some type of mechanical test. A court's decision whether or not it has ancillary jurisdiction in a given context will depend upon what it believes constitutes the boundary of the "claim" in the action. Whether-

less, the real basis for a court's determination is not simply a matter of guesswork. The decision ultimately will be based on a weighing of the court's desire to preserve the integrity of constitutionally based jurisdictional limitations against the desire to dispose of all disputes arising from one set of facts in one action. The advantage of a pliable ancillary jurisdiction concept is that in the long run a balance between the two opposing objectives will be struck that is responsive to the underlying policies of Rule 14."

(Wright and Miller, *Federal Practice and Procedure,* §1444 at 221-2.)

Judge Talbot Smith's majority opinion in the case at bar, while directing itself to the issues raised, by us, exceeded in depth our best efforts on the brief. To attempt improvement on it would be inappropriate and it is, of course, representative of our position without further reprinting or comment.

However, *Dery v. Wyer,* cited supra, is deserving of quotation as supportive of respondent's position. The Second Circuit's language that seems germane is as follows:

"We also hold that the ancillary jurisdiction over the third-party complaint was not lost when the main cause of action was settled. Generally, in a diversity action, if jurisdictional prerequisites are satisfied when the suit is begun, subsequent events will not work an ouster of jurisdiction. Mullen v. Torrance, 9 Wheat, 536, 6 L. Ed. 154; St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845; Hardenbergh v. Ray, 151 U.S. 112, 14 S. Ct. 305, 38 L. Ed. 93. This result is not attributable to any specific statute or to any language in the statutes which confer jurisdiction.

It stems rather from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action. Moreover, in cases involving the impact of jurisdictional problems on the joinder of claims under Rule 18 it has been held that jurisdiction of the ancillary claims survives the final disposition of the main claim. American Fidelity & Casualty Co. v. Owensboro Milling Co., supra; Lindquist v. Dilkes, 3 Cir., 127 F. 2d 21. In principle, the same rule would seem to be applicable to third-party claims which under Rule 14 must rest on the same transaction or set of facts as the main claim and thus fall within the 'First category' described in Hurm v. Oursler, supra, 289 U.S. at page 246, 53 S. Ct. at page 590.

"Considerations of policy, as well as the foregoing analogies, accord with our conclusion. If the main claim and the third-party claim are tried together and a decision or a settlement in favor of the plaintiff is announced on the main claim in advance of decision of the third-party claim, to hold that the determination of the main claim ousted the court of jurisdiction over the ancillary claim would in many cases entail a serious waste of effort by both the judge and the litigants. The natural tendency would be to discourage settlements. And the same considerations, though perhaps to a lesser degree, would tend to discourage adjudications on motions and settlements in advance of trial. Confusion would result from such doctrine not only as to the timing but also as to the nature of the event causing loss of the ancillary jurisdiction. If the jurisdictional loss were held not to flow from a settlement of the main claim after trial, can it consistently be held that a settlement thereof at some pre-trial stage will operate to terminate jurisdiction over the

third-party claim? Is an out-of-court agreement of settlement an operative jurisdictional factor, or must the agreement be translated into a judicial order to dismiss the claim as moot or to enforce the settlement? Not infrequently, if ancillary jurisdiction were thus subject to defeasance, the third-party claim might be time-barred although, to be sure, that seems not to be an immediate hazard in this case. In short, a rule that ancillary jurisdiction of a third-party claim terminates on a determination of the main claim will seriously impair the utility of the Rule, breed confusion and generate many sterile jurisdictional disputes.

"We find no authority in conflict with our holding. It is true that there are a number of cases holding that a court, just as it has discretion under Rule 14 to implead a third-party, may in its discretion dismiss the third-party complaint. In some cases the discretion to dismiss has been exercised. Duke v. Reconstruction Finance Corp., 4 Cir., 209 F. 2d 204; State of Maryland to Use and Benefit of Wood v. Robinson, D.C.D. Md., 74 F. Supp. 226. In other cases, the court in the exercise of its discretion has retained jurisdiction. Oakes v. Graham Towing Co., D.C.E.D. Pa., 135 F. Supp. 485. But this appeal involves no question as to such discretionary power in a trial court. No motion to dismiss was made below and the judge, instead of entering a discretionary dismissal, proceeded to try the third-party claim. We think the original ancillary jurisdiction survived." (*Dery v. Wyer,* 265 F. 2d 804, pp. 808, 809.)

An analysis of the arguments argued by supporters of a flat, inflexible prohibitory rule is given and answered by Professor Moore in the following:

"But regardless of jurisdictional developments under Rules 18 and 20, *United Mine Workers* can

authorize an independent relaxation of the rule against ancillary jurisdiction over plaintiff's amended claims against the third-party defendant. At the outset, the question must be redefined. It should not be a question of pure law posing the choice 'either there is ancillary jurisdiction and the court must take it, or there is no ancillary jurisdiction, and the court cannot take it.' Instead, since there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. *Once this basic redefinition takes place, the traditional reasons given for supporting a rule of flat prohibition do not necessarily disappear. Instead they become factors for the trial court to consider in exercising its discretion.*

"The first reason given in support of the prohibitory rule is that A.B. should not be allowed to do by an indirect route what he could not do directly. In response, it can first be argued that it is no longer so clear in all cases what A.B. is forbidden to do directly. But even so, why shouldn't A.B. be able to do it indirectly? A.B. took his chance in suing C.D. alone in the federal court. It was C.D.'s choice, not A.B.'s, to bring in E.F., and now that E.F. is before the court, judicial economy and convenience may dictate that the court dispose of the whole case by allowing all claims deriving from a common nucleus of operative fact.

"The second argument given to support the prohibitory rule is that it prevents collusion between A.B. and C.D. to obtain federal court jurisdiction over claims against E.F., when such jurisdiction would otherwise not exist. But the adequate answer to collusion is dismissal under 28 USC §1359. Fears of collusion do not justify a wholesale denial of jurisdiction.

"The third argument supporting the prohibitory rule is that E.F. has been brought in on the basis of ancillary jurisdiction over C.D.'s third-party claim even though E.F. is of the same citizenship as A.B. on the assumption that A.B. will seek no relief against E.F. This argument too narrowly states the grounds for ancillary jurisdiction over the claim of C.D. against E.F. While it is true that the argument was given in many past decisions as a reason for justifying ancillary jurisdiction over the third-party claim of C.D. against E.F., this past reasoning should not now constitute an absolute prohibition of additional ancillary jurisdiction over claims between A.B. and E.F. Ancillary jurisdiction is a much broader concept resting upon multiple reasons of economy and convenience. Thus, it is clearly established that ancillary jurisdiction allows jurisdiction over claims and counterclaims between C.D. and E.F. even though those claims lack diversity and jurisdictional amount and could not have been brought as original law suits. The same broad principle and result should not be offensive when applied to ancillary jurisdiction between A.B. and E.F. If E.F. had voluntarily entered the suit as a non-indispensable defendant by intervention under Rule 24(a), there clearly can be ancillary jurisdiction over the claims between E.F. and A.B. The same result should be obtained whether E.F. enters voluntarily under Rule 24 or involuntarily by C.D.'s impleader under Rule 14. In brief, there should be no rule forbidding building one ancillary jurisdiction on another.

"The fourth argument given is that federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation. The answer to this argument is that under cooperative federalism the federal courts have a higher duty to end all court congestion, not just

that in the federal courts. If federal courts refuse to use conceptual tools to dispose of all related claims with the greatest economy and convenience, the federal courts then add to the total ineconomy and inconvenience which litigants must suffer to obtain justice on the merits of their claims.

"A fifth argument could be raised either that the prohibitionary rule was fixed prior to the Federal Rules and jurisdiction cannot be expanded by the Rules, or that the prohibition has become so fixed since the adoption of the Rules, that in either view, legislation is required to change it. The answer to this argument is found in the *United Mine Workers* theory that the new Federal Rules provisions for multi-claim, multi-party litigation do not constitute expansions of jurisdiction, but rather, the opportunity for the federal system fully to exercise dormant jurisdiction which preexisted but which was not developed for lack of procedural devices. Finally, even under the Rules, the majority precedent since 1938 is not so clear that the minority view can be adopted only with legislative approval.

"If federal courts continue the development of these trends, the most obvious case for taking jurisdiction of an amended claim by A.B. against E.F. would be where the claim by A.B. against C.D. rests upon exclusive federal court jurisdiction; the second most obvious case would be where the claim by A.B. against C.D. rests upon federal question jurisdiction concurrent with the state courts; the third case would be where the claim by A.B. against C.D. rests upon diversity, and there is diversity between A.B. and E.F., but A.B.'s claim against E.F. is below the jurisdictional amount; the last case would be where the claim by A.B. against C.D. rests upon diversity but there is no diversity between A.B. and E.F.; and finally there could be variations of these patterns.

It should be recalled that under the suggestions made here, the assertion of jurisdiction over claims would be grounded in discretionary power and thus would be subject to developing standards of discretion."

From: *Moore's Federal Practice,* 2nd Ed. pp. 14-570 to 14-574, Footnotes deleted — text only.

Expansion of Jurisdiction To Increase Federal Litigation?

The increase in federal litigation that could be occasioned by an affirmance on the facts of this case is so improbable as to be in effect impossible. Where would one find again the following factors and what would the odds be against finding them together in any other future case?

1. A geographical confusion such as exists west of the Missouri River as to a shred of Iowa.
2. A company that is incorporated in Nebraska and signs its pleadings, "A Nebraska Corporation," yet places its cranes, not exclusively but most of the time, in that shred of Iowa.
3. A company that has no employees (C. of A. App. 110) and no physical assets except two movable cranes which operate mostly but not exclusively in that scrap of Iowa on the west side of the river. (C. of A. App. 130.)
4. A company that answers a third party complaint under Rule 8(b) in the manner that is found in this case.
5. A situation where the plaintiff, the defendant and the third-party defendant were all properly in court at the time the state statute of limitations ran and all three remained properly in federal court for eighteen months thereafter.

6. A company that prepares, moves and presents a motion for summary judgment raising all points available *except* a jurisdictional claim.
7. A defendant who raises the issue for the first time in the waning moments of a jury trial.

Even without these unique factors *Wright and Miller* discount any claim that holding such an ancillary claim for disposition will increase the burden on the federal courts in the last sentence of the following analysis:

> "Two arguments against applying ancillary jurisdiction generally are made. First, it is argued that plaintiff should not be allowed to do indirectly what he cannot do directly. If, for example, there is no diversity between plaintiff and the third-party defendant and the dispute between them does not involve a federal question, plaintiff could not sue him in an independent action and should not be allowed to assert a claim against him simply because he has been brought into the action by defendant. But this argument ignores the fact that plaintiff cannot determine whether the third-party defendant will be made a party to the action. The bringing in of the third-party is determined by the original defendant and recognizing ancillary jurisdiction in this context would not encourage plaintiff to initiate actions in the hope that the third-party defendant would be impleaded.
>
> "The second objection to permitting ancillary jurisdiction is that the third-party defendant may have been made a party to the action as a result of collusion between plaintiff and defendant. The response to this fear is that rather than totally rejecting the use of ancillary jurisdiction in the context of claims by the original plaintiff against the third-party defendant, the courts should dismiss only

those claims that the third-party defendant can show have been asserted collusively. Also, as has been pointed out earlier, the type of impleader most likely to occasion collusion between plaintiff and the third-party defendant was eliminated by the 1948 amendment to Rule 14(a). Defendant no longer can bring in a third party solely on the basis that he is liable to plaintiff; he must be able to assert a claim against the third-party on his own behalf. If he asserts a valid third-party claim, presumably he will stand to benefit thereby; his other motives for doing so and the fact that it works to the benefit of the plaintiff should not be relevant. Moreover, any claim plaintiff may assert against the third-party must arise out of the transaction or occurrence that already has been made the subject of the court's jurisdiction and is between persons who have been made parties to the action. Exercising ancillary jurisdiction in such a case therefore will not increase the burden on the federal court appreciably and the possibility of reducing the overall burden on both the state and federal courts will be enhanced."

(Wright and Miller, *Federal Practice and Procedure*, §1444 at 229-32.)

Forum Choice

Petitioner makes much of the fact that respondent, in her original filing against Omaha Public Power District, chose the forum. True. It was a forum chosen for a case against what classifies in Nebraska as a political subdivision, which accounted for an early six month delay on what is known as a mandatory claim delay. The forum was not chosen to gain some advantage in a case against petitioner. The fact that some may assume that federal judges are superior in some way to other

judges should not give petitioner cause for complaint. Petitioner further makes no showing as to how the forum in any way prejudiced it, which of course, it did not.

It should be further noted that respondent was not an "in-state" plaintiff who gained geographical advantage by bringing her original action in the state of her residence.

Petitioner's Answer under Rule 8(b)

Two years prior to trial respondent's complaint against petitioner had charged that petitioner was a Nebraska corporation with its principal place of business in Nebraska. Petitioner did not deny this outright but utilized a qualified general denial admitting it was "organized and existing under the laws of the State of Nebraska and denied each and every other allegation. (C. of A. App. 19.)

In *Biggs v. Public Service Coordinated Transport*, 280 F. 2d 311 (3rd Cir. 1964) the plaintiff asserted a proper amount in controversy and that the defendant was a New Jersey corporation doing business in Pennsylvania. Defendant denied specifically the amount in controversy but the allegation that defendant was incorporated in New Jersey was only met by a qualified general denial. The *Biggs* court held:

> "We cannot for a moment believe that defendant's counsel was denying in good faith that his client was a New Jersey corporation. We think the only fair interpretation of the pleading in this case is that the denial does not run to the allegation of defendant's citizenship. Therefore, that allegation must be deemed to be admitted."

Aldinger v. Howard

In footnote 29 of Judge Talbot Smith's majority opinion in the case at bar, he recites:

> "Owen contends that the recent Supreme Court decision, Aldinger v. Howard (citing) supports its contention that the District Court was without power to exercise jurisdiction over Kroger's direct claim against it. We disagree."

His reasons for disagreement with Owen's contention in this regard are set out in the balance of the fairly lengthy footnote and need not be included again herein.

However, while covering the same principle of distinction, Judge Smith felt it probably unnecessarily cumulative to include other *Aldinger* language to a similar effect:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.'"

Being mindful of the fact that pendent rather than ancillary jurisdiction was being considered, it would seem that if a parallel philosophy were present it would

classify the present situation at bar as falling within the first rather than the second category of the above quoted excerpt.

Respondent impleaded no new party but when she filed she took a party already in the suit as she found it.

Di Frischia v. New York Central
(Third Circuit)

Petitoner criticizes Judge Smith's reliance on the case of *Di Frischia v. New York Central Railroad*, 279 Fed. 2d 141 (3rd Cir. 1960) and to prove its point cites "*Law of Federal Courts*, Charles Alan Wright."

While quoting one sentence from the volume, petitioner neglects to refer to the in-depth analysis of the issue at other sections of the 1970 Edition including the final conclusion at Chapter 10, page 380, last paragraph of Sec. 76 which reads:

> "Dismissal or settlement of the main action does *not* require dismissal of the third-party action, even though there are no independent grounds of jurisdiction for the third-party action, but if consideration of convenience will be equally well served, the court *has discretion* in such a situation to dismiss the third-party proceeding and leave these ancillary matters to be determined in the state courts." (Emphasis added.)

Kenrose v. Whitaker

The *Kenrose* Fourth Circuit case is much quoted and heavily relied on by petitioner. It points up the fact that there is a dispute between circuits on the breadth of ancillary jurisdiction but with a minority growing stronger, if not now close to equality.

Even *Kenrose* notes that factors may be present that should be taken into consideration in exercising some flexibility in assessing the presence or absence of jurisdiction and notes the fact that in *Kenrose* a state court remedy was still available, illustrated by the following language from *Kenrose:*

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially, is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."

Kenrose was in 1971. In September, 1975, the Fourth Circuit again had occasion to approach the area of ancillary jurisdiction in *Parker v. Moore,* 528 F. 2d 764. In that case an early in the case dismissal of a non-diverse defendant was affirmed but the language of the court is interesting:

> "In *Kenrose Mfg. Co. v. Fred Whitaker Co.,* 4th Cir., 512 F. 2d 890, we broadly held that there must be an independent basis of jurisdiction of a claim by a plaintiff against a third-party defendant. (Footnoting as follows)
>
> > 'After *Kenrose* was decided but before it was published, there was a case in the Eastern District of Virginia in which it was decided that, under the doctrine of pendent jurisdiction, contract claims could be asserted in the diversity jurisdiction even though there was no diversity of citizenship between the plaintiff and one of the two co-defendants when the principal alleged obligor was the diverse defendant. We think that a misuse of the pendent jurisdiction doctrine, which was designed to extend federal jurisdiction to encompass pendent state claims against defendants already in the case to defend the primary federal claims. It was not designed to bring into the diversity jurisdiction claims between parties who are citizens of the same state.'

"Were we inclined under any other context to reconsider the absolute rule of *Kenrose,* we would not find it appropriate to do so here."

The court then concluded in the following language:

> "We thus adhere to our ruling in *Kenrose,* at least in the circumstances of a case such as this, and conclude that there is no ancillary federal jurisdiction of the plaintiff's claim against Moore. The dismissal of his complaint as against Moore is therefore affirmed."

Is it our imagination or do we detect a possible uneasiness of the Fourth Circuit regarding the breadth and inflexibility of the holding in *Kenrose* as being subject to possible future modification given the right case and right circumstances?

Present State Court Remedy?

In his Eighth Circuit dissent, Judge Bright suggests that a possible remedy may exist even four years after the statute of limitations has run, under a "savings clause" of the State of Iowa. Frankly, to place alternative reliance on such, after five and a half years of litigation in the federal courts, is nebulous and uncertain as the laws of Iowa on this subject are as murky and indefinite as are the boundaries of the state on the west side of the Missouri River. To begin litigation again, even if possible, would be oppressive.

Predictably, carefully preserving a state court defense should it prevail in this appeal, the petitioner cautiously avoids printed comment, commitment or agreement with Judge Bright's suggested possible state court remedy.

One of the difficulties in analyzing the finality of both Circuit and District Court decisions on the issue in chief is that in most of the cases we are not able to tell whether a state court remedy was still available and that the cases were not appealed for that reason, the alternative state filing being made to avoid the uncertainty of an appeal.

Even the dissent in *Dery v. Wyer,* 265 F. 2d 804 (2d Cir. 1959) recites the fact of availability as follows:

> "If the district court dismissed the third-party complaint there would still be ample time for the Railroad to bring its indemnity action in the New York Courts as the liability of the Lumber Company did not arise until the Railroad was compelled to pay the plaintiff and hence the New York six year statute of limitations for actions on a contract has not run."

Thus it appears that the statute had not run in *Dery* and was considered as a factor of importance even in the dissent.

Petitioner's Claim of Fifth Amendment Violations

As a last ground for complaint herein the petitioner asks the court to grant it relief on the grounds that its Fifth Amendment rights were violated by the U.S. Court of Appeals for the Eighth Circuit in that the three judges of that Court interrogated petitioner's counsel in

the oral arguments on a matter on which petitioner's counsel was not prepared and was taken by surprise and infers that such unauthorized interrogation was in some way damaging to the petitioner.

This somewhat bizarre invocation of the Fifth Amendment is presumably based on the theory that it was unaware in advance of the oral arguments that complaint was being made about the untimeliness of raising the jurisdictional question. At line 18, page 36 of Petitioner's Brief for Certiorari, petitioner states:

> "The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit."

In answer thereto respondent refers the Court to matters that occurred nine months before the oral arguments in this case. In Judge Denney's memorandum opinion filed January 23, 1976, the following appears:

> "However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this 'pendent' claim. Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. *Despite the fact the defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint.* No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction." (Emphasis added.) A.56.

Again, in the memorandum opinion of the trial court on February 6, 1976, we find:

"DENNY, District Judge

"This matter comes before the Court upon the motion of defendant for judgment notwithstanding the verdict or, in the alternative, for new trial (Filings No. 103, 104). The Court shall ignore counsel's irrational, inflammatory language in his supporting brief directed as his misconception of judicial impropriety and shall address the legal issues raised. Counsel's request for oral argument before this Court on said motions is denied.

"Defendant takes vehement exception to this Court's denying its motion to dismiss. Defendant asserts that the Court acted in contravention of direct Eighth Circuit precedent, citing *United States v. Lushbough,* 200 F. 2d 717 (8th Cir. 1952). Defendant should read this Court's Memorandum carefully. The Court based its decision on *United Mine Workers of America v. Gibbs,* 393 U.S. 715 (1966), which was decided long after *Lushbough. Likewise, defendant's exception to this Court's comments concerning defendant's long silence on the jurisdictional issue is the result of failure to comprehend the Court's holding.* This Court held that retention of ancillary jurisdiction is discretionary with the trial court. *The untimeliness of defendant's motion is unquestionably relevant to the exercise of discretion."* (Emphasis added.) A.60-61.

In the opinion in the case Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation recites:

"Appellant *finally* admitted on oral argument to us, *after close questioning,* a point clear from the pleadings, namely, that it had not specifically challenged the diversity jurisdiction of the court at any

time during the long course of the pleadings, and particularly had not done so in response to the plaintiff's amended complaint filed on November 9, 1973, charging Owen to be 'a Nebraska corporation with its principal place of business in Nebraska.' (emphasis ours)"

Respondent submits that if a favorable result based on jurisdiction can be achieved by these methods it could also be achieved by false answers to discovery interrogatories or perjury in discovery depositions — the principle would be the same. Penalties later levied against the malefactors would be of little value to a widow and children sent empty handed from the court system. Lord Campbell would probably agree.

Petitioner's brief asks some rhetorical questions intended either for the Court or the respondent and in case of the latter the possible answers are as follows:

Q. (p. 28 Petitioner's brief) If petitioner were intentionally "sandbagging" the court, why then didn't petitioner wait until the day after the statute of limitations had run on January 19, 1974 to raise the issue of lack of subject matter jurisdiction rather than waiting until the first day of trial to raise the issue?

A. Because at that time all parties were in court and petitioner's attorneys may have read *Gibbs,* the *Olson* decision of Judge Van Pelt, Messrs. *Wright & Miller, Moore's Federal Practice* and concluded that it would be better to first try to win the case on its merits or at least see how the trial was going.

Q. Why wouldn't the issue of lack of diversity of citizenship have been the subject of the motion of summary judgment which this defendant filed September 4, 1974?

A. Same answer as above coupled with the fact that it was the only defense it *thought* it could hold as an "ace in the hole" should the trial be going badly.

The next paragraph on page 28 of petitioner's brief is foundationed on an *ex parte* affidavit filed *after* the opinion of the Eighth Circuit. This affidavit was by one of petitioner's lawyers in support of another of petitioner's lawyers and contained an explanation that would have been more timely and appropriate had it been advanced in response to the "close questioning" of the Court in the oral arguments months before.

Respondent further submits that the affidavit of Mr. Becker (A. 102), relied on by petitioner, was filed after the opinion of the Court of Appeals and not subject to rebuttal by petitioner until now. Had the affiant in that affidavit been subject to cross examination, the affiant could have been confronted with the certificate of incorporation attached as an appendix hereto. This shows that from October 21, 1946 to the present time petitioner's principal place of business was at all times in Omaha, Nebraska.

> "In the case of a domestic corporation, its principal place of business is the location it so designates in its charter or certificate of incorporation." *Kibler v. Transcontinental and Western Air, Inc.*, 63 F. Supp. 724, ED., New York.

The testimony adduced by the petitioner at the trial on examination of its secretary was simply an incorrect legal conclusion of a layman regarding the phrase, "principal place of business." As to the affidavit of Mr. Becker (A. 102), the certificate of the Secretary of State indicates a probably good faith but somewhat incomplete search by Mr. Becker of his file, particularly as to its most important aspect.

Petitioner then, on page 29 of its brief, attacks respondent by splicing together an excerpt from a deposition and an excerpt from a pleading and says in effect "You should have known." In view of the fact that petitioner's attorneys were at the same deposition this nonsequitur seems in direct conflict with its protests that it itself did not know until the second day of trial.

Most supportive of the findings made by the Court of Appeals on the issue of concealment is the analysis of the language of the pleadings as contained in the timetable and the Appendix to the opinion, coupled with the fact that all three of the Judges who conducted the questioning in St. Louis came to the same conclusion on this issue. They were, in effect, the jury that "saw the witness and heard the testimony." On this issue their verdict was unanimous.

All of the foregoing is occasioned by the fact that the Fifth Amendment was raised by the petitioner, and respondent feels that it is incumbent upon her to defend against this issue and to recite facts in support of the three circuit judges' findings of intentional concealment in deference to that court. Respondent derives no satisfaction from this discussion.

It is respectfully suggested that if the matter is susceptible to just solution based solely upon the *effect* of petitioner's conduct rather than the *motivation* of the conduct, such disposition would be desirable in the interest of the image of the bar.

CONCLUSION

Subject matter jurisdiction existed and exists in this case. The preservation of at least limited flexibility vesting discretionary powers in a trial judge is a neces-

sity required by the ends of justice in some cases.

Respondent submits that this is the case of all cases justifying the foresight of this court in the hesitancy it has previously shown by narrowing its decisions to avoid the injustice of a hard, fast and inflexible prohibitory rule.

Respondent respectfully prays that the five and one-half year conflict in the federal courts by the widow of James Kroger result in the just compensation that is her entitlement.

Respectfully submitted,

Warren C. Schrempp
1600 Woodmen Tower
Omaha, Nebraska 68102
and
Richard E. Shugrue, John J. Hanley
and Thomas G. McQuade
Of Schrempp & McQuade
1600 Woodmen Tower
Omaha, Nebraska 68102
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent have been mailed by first-class mail to: Emil F. Sodoro, David A. Johnson, Ronald H. Stave, 200 Century Professional Plaza, 7000 Spring Street, Omaha, Nebraska 68106, Attorneys for Petitioner.

Warren C. Schrempp

WARREN C. SCHREMPP
Attorney for Respondent

March 17, 1978

APPENDIX

STATE OF NEBRASKA

Department of State

I, Allen J. Beermann, Secretary of State of the State of Nebraska do hereby certify that

the attached is a true and correct copy of the first page of the Articles of Incorporation of Owen Equipment and Erection Co., with the registered agent and office shown as Edward F.Owen, 2534 No. 52nd St., Omaha, Nebraska, and with the principal place of business being listed as Omaha, Douglas County, Nebraska, as filed and recorded in this office on October 18, 1946; the first page of the Change of Registered Office document stating that the registered office was changed to 5420 Nicholas St., Omaha, Nebraska, as filed and recorded in this office on September 13, 1968.

I further certify that the other documents filed for Owen Equipment and Erection Co. are as follows: Articles of Merger of Owen Railway Supply Co., merging into this corporation on June 7, 1976, and no other amendments filed until the last Articles of Merger whereby this corporation merged into Paxton & Vierling Steel Co., also with registered office located in Omaha, Nebraska, as filed and recorded in this office on February 22, 1977.

This certification does not include the complete copies of documents for Owen Equipment and Erection Co.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

Done at Lincoln this Sixteenth day of March in the year of our Lord, one thousand nine hundred and seventy-eight.

Allen J. Beermann
SECRETARY OF STATE

DEPUTY

ARTICLES OF INCORPORATION

OF

OWEN EQUIPMENT AND ERECTION CO.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned have organized and formed a corporation under and by virtue of the laws of the State of Nebraska and to that end have adopted the following Articles of Incorporation:

ARTICLE I

The name of this corporation shall be Owen Equipment and Erection Co.

ARTICLE II

The principal place of business of said corporation shall be located in the city of Omaha, Douglas County, Nebraska, and the corporation's resident agent is Edward F. Owen, 2534 North 52nd Street, Omaha, Nebraska.

ARTICLE III

The general nature of the business to be transacted by the corporation, and the objects and purposes for which it is organized shall be as follows:

To buy, sell, lease, manufacture, fabricate, process and generally deal in and with any and all types of machinery, fixtures, tools, appliances and equipment or other personal property of any kind or character, promote and develop new ideas and processes for the production thereof, to erect, assemble and install all types and manners of structures and equipment;

To take, own, hold, mortgage or otherwise encumber, and to buy, lease, sell, exchange or in any manner dispose of real estate or personal property of every class and description both within the State of Nebraska and elsewhere;

To enter into, make and perform contracts of every kind for any lawful purpose with any person, firm, association, corporation, public or private;

To do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world, as principals, agents, trustees or otherwise, and either alone or in company with others;

IN GENERAL, to carry on any business in connection therewith not forbidden by the laws of the State of Nebraska and with all of the powers conferred upon corporations by the laws of the State of Nebraska.

DOMESTIC
CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE

To: FRANK MARSH, Secretary of State, Lincoln, Nebraska

1. The name of this corporation is Owen Equipment and Erection Co. (name of corporation), and said corporation is organized under the laws of the State of Nebraska, with principal office located at 5420 Nicholas Street (street) Omaha (city) Nebraska (state), and that pursuant to the laws of the State of Nebraska, does hereby wish to change its Registered Agent and/or Registered Office, in the State of Nebraska.

2. The address of its present registered office is 2536 No. 52d Street (street) Omaha (city) Douglas (county) NEBRASKA.

3. If the address of its registered office be changed, the address will be: 5420 Nicholas Street (street) Omaha (city) Douglas (county) NEBRASKA.

4. The name of its present registered agent is Edward F. Owen (name) 5420 Nicholas Street (street) Omaha, (city) Douglas (county) NEBRASKA.

5. If the registered agent be changed the successor registered agent shall be: N/A (name) (street) (city) (county) NEBRASKA.

6. The corporation further states that the address of its Registered Office and the address of the business office of the Registered Agent are identical.

The changes designated above were authorized by resolution duly adopted by the Board of Directors on the 13 day of August, 1968.

Dated this 13 day of August, 1968

Edward F. Owen
(must be signed by either the President or a Vice President of the corporation)
Edward F. Owen, President

Fee: Filing $5.00
Recording 1.00
$6.00

Form No. CD 1
SUBMIT TO THE SECRETARY OF STATE IN DUPLICATE.

1021

In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,

Respondent.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

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GERALDINE KROGER, Administratrix of the Estate of JAMES D. KROGER, Deceased,

Respondent.

REPLY BRIEF OF PETITIONER

ARGUMENT

Respondent has set forth in her brief arguments and comments for which neither case law nor support in the record exists. These points will be addressed by petitioner in the order in which they appear in respondent's brief.

I.

Respondent cites the case of *Dery v. Wyer,* 265 F. 2d 804 (C. A. 2d, 1959), as authority for the rule:

> "In addition to the right of a defendant to implead a third-party defendant, a plaintiff may assert a claim against such third-party defendant if that claim arises out of the transaction that is the subject matter of plaintiff's claim against the original defendant." (Respondent's brief, page 9).

The case of *Dery v. Wyer,* supra, does not stand for that proposition. That case involves the power of a federal court under the doctrine of ancillary jurisdiction to try the claim by a defendant against a third-party defendant unsupported by an independent basis of jurisdiction after the main action between the plaintiff and defendant has been settled. The Second Circuit set forth its holding as follows:

> "In this case, we hold, the jurisdiction which the court below had acquired over the plaintiff's claim was broad enough to comprehend jurisdiction of the ancillary third-party claim and that the ancillary jurisdiction attached when the impleader was accomplished.
>
> "We also hold that the ancillary jurisdiction over the third-party complaint was not lost when the main cause of action was settled."

That case did not involve the same alignment of parties as that which is now before this court—a claim by a plaintiff against a third-party defendant unsupported by an independent basis of jurisdiction.

Respondent has been unable to cite to this court any Court of Appeals decision in support of its position that

an independent basis of jurisdiction is not required before a plaintiff may assert a claim aaginst a third-party defendant.

Petitioner does not quarrel with the rule of *Dery v. Wyer.* The defendant, Omaha Public Power District, did have the right to file a third-party complaint against petitioner. What petitioner does object to is a rule allowing a plaintiff to assert a state law claim against a third-party defendant with whom plaintiff has a common basis of citizenship.

II.

Respondent claims that the decision in its favor will not expand jurisdiction to increase federal litigation. In support thereof, respondent lists seven different factors peculiar only to this case and implies that unless those specific factors are present in another case that the rule established by a judgment in favor of respondent in this case would be inapplicable. For instance, several of the specific factors which the plaintiff claims would be necessary are:

> "1. A geographical confusion such as exists west of the Missouri River as to a shred of Iowa.
>
> "2. A company that is incorporated in Nebraska and signs its pleadings, 'A Nebraska Corporation,' yet places its claims, not exclusively but most of the time, in that shred of Iowa." (Respondent's brief page 18).

That assertion of respondent is absolutely preposterous. The rule which plaintiff demands of this court is that a plaintiff may assert a state law claim against a third-party defendant having common citizenship with the

plaintiff, without an independent basis of jurisdiction. That can do nothing but expand jurisdiction and increase federal litigation.

III.

Respondent claims that petitioner's answer was not sufficient under Rule 8 (b), because it was a general denial admitting that petitioner was organized and existing under the laws of the State of Nebraska, but denying each and every other allegation in the complaint. Rule 8 (b) provides in part:

> "Unless the pleader intends in good faith to controvert all averment of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all averments except such designated averments or paragraphs as he expressly admits; . . ."

The answer which petitioner filed to the complaint of the respondent complied in all respects with that rule.

The case of *Biggs v. Public Service Coordinated Transport,* 280 F. 2d 311 (3rd Cir. 1960), cited by respondent has no application. In that case the defendant generally denied all allegations as to corporate citizenship. The defendant failed to specifically deny, however, that it was a New Jersey corporation.

In the instant action the petitioner admitted that it was a corporation organized and existing under the laws of the State of Nebraska but denied each and every other allegation contained in the plaintiff's complaint. Rule 8 (b) provides that a general denial is sufficient as to all averment "including averments of the grounds upon which

the court's jurisdiction depends". Moreover, it is obvious that from the evidence adduced in the *Biggs* case, there was no question but that the defendant was a New Jersey corporation which served as a basis for the finding of the court.

In the trial of the instant matter in proceedings held outside the hearing of the jury, counsel for the respondent attempted to allege that petitioner had admitted paragraph 2 of the respondent's amended complaint which paragraph contained the jurisdictional allegation. The colloquy between counsel and the court was as follows:

> The Court: The only thing that concerns me is this pendant or ancillary question. I once had jurisdiction and then because one defendant is dismissed out of it, do I still retain the case? He is going to present a brief to that and then I want you to answer it. That does worry me. There is no question in my mind that it is proper to have jurisdiction against a sole defendant, say they just sued Owen Equipment alone, that you had to allege they had to be a Nebraska corporation and they had their principal place of business in Nebraska.
>
> Mr. Dinsmore: I agree with the Court.
>
> The Court: And the proof shows that they had their principal place of business in Carter Lake, Iowa, and you did allege it in the amended complaint that they were a Nebraska corporation and they had their principal place of business in Nebraska.
>
> Mr. Dinsmore: Is that in the amended complaint?
>
> The Court: That is in the amended complaint.
>
> Mr. Dinsmore: I am sure the Court is correct.
>
> The Court: That the defendant Owen Equipment and Erection Company is a Nebraska corporation with its (Page 208) principal place of business in Nebraska.

Mr. Dinsmore: Is that paragraph one or two?

The Court: That is paragraph two of the amended complaint filed November 9, 1973.

Mr. Dinsmore: Which I think they admitted in their answer.

Mr. Johnson: No, we did not.

The Court: *I don't think they ever admitted anything. The proof here before this Court today by the secretary of the Owen Equipment and Erection Company, their principal place of business was in Carter Lake, Iowa.* That is the proof before the Court so there is a question here and it can only be obviated if this Court has pendant or ancillary jurisdiction. That is the point that I want to check overnight, but I am going to take that motion under advisement and I will be able to tell you something about it tomorrow morning but I will require you to proceed while I am taking it under advisement. (Emphasis added.) (C. A. Appendix, Vol. II, pp. 160 and 161).

The first time the sufficiency of the petitioner's answer was contested was in the opinion of the Court of Appeals, wherein the court stated:

> "This form of answer was in violation of Fed. R. Civ. P. 8 (b) which provides that '(W)hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and deny only the remainder.'" (Appendix to Petition for Certiorari, App. 4).

An examination of the index of the brief of the respondent (appellee) on appeal, United States Court of Appeals for the Eighth Circuit reveals that the matter of defendant's answer was never discussed nor was Rule 8 (b) cited or ever mentioned therein. It is obvious that respondent *conceded* as sufficient petitioner's answer as initially filed herein.

IV.

The respondent contends that petitioner is amiss in its claim that the issue of the concealment of the citizenship of petitioner never matured until oral argument was had before the Eighth Circuit. In support thereof, respondent cites from two memorandums of the trial court (Respondent's brief, pages 27 and 28).

In neither of those Memorandum Opinions, however, is there any claim of concealment. The court questioned the *lateness* of the raising of the issue of lack of diversity of citizenship but never raises the issue of concealment. Moreover, the court emphasized that the issue could be raised at any time and that the *only* thing that concerned the court was the question of pendent or ancillary jurisdiction not the time when the issue was raised (A. 96). The respondent has had several opportunities before this court to explain those comments of the court and their relation to these proceedings but as of this time has failed to do so. It is clear that the only issue before the trial court was that of pendent or ancillary jurisdiction. Concealment was never a factor.

Respondent complains of the affidavits of counsels for petitioner included in the appendix at pages 102 and 103. Those affidavits were submitted by petitioner after what appeared to petitioner to be unwarranted findings on the part of the Court of Appeals for the Eighth Circuit as to the issue of concealment. Those affidavits were made a part of the petition for rehearing filed by re-

spondent in the Court of Appeals for the Eighth Circuit. If respondent desired to counter those affidavits, she could have done so at that time.

It is now claimed by respondent on appeal that:

> "Had the affiant in that affidavit been subject to cross-examination, the affiant could have been confronted with the certificate of incorporation attached as an appendix hereto. This shows that from October 21, 1946 to the present time petitioner's principal place of business was at all times in Omaha, Nebraska."

Counsel for respondent called as a witness, Herbert M. Peterson, the corporate secretary of petitioner. On cross-examination by Mr. Johnson, Mr. Peterson testified as follows:

By Mr. Johnson:

Q. Mr. Peterson, I have just a few questions. As an officer of the Owen Equipment and Erection Company corporation and specifically just by way of general background here, on November 9, 1973 when the amended complaint was filed by Owen Equipment Company in this case, the corporation was organized, as I understand it, in Nebraska, is that right?

A. Yes.

Q. And at that time it had its, as I understand it, principal place of business in Carter Lake, Iowa?

A. Yes.

(Page 174) Q. Where the corporate offices were, have been, and still are?

A. Yes.

Q. Since November of 1973 has the income of Owen Equipment and Erection Company been—

Mr. Dinsmore: Excuse me. May I approach the bench, Your Honor? I have an objection to make and I would like to make it out of the presence of the jury.

The Court: Step up here, gentlemen.

(The following proceedings was held at the bench.)

Mr. Dinsmore: Judge, I believe that Mr. Johnson is getting into an area trying to evoke sympathy from the jury.

Mr. Johnson: No, I am not.

Mr. Dinsmore: To show that Owen Equipment has a very little income and so that therefore any verdict rendered should be very minimal. In anticipation of that, with any inquiry as to the limited income or minimal amounts of Owen Equipment Company, if he does get into that, then I would like to have the right to show what the limits of the insurance policy is.

The Court: What is the purpose of your (Page 175) question?

Mr. Johnson: For two reasons. Primarily by way of background in this case and second just to show what the cranes rent for.

The Court: You asked him what the income was.

Mr. Dinsmore: And how much he got from the rental of the crane.

I did not ask about that and I just didn't get into it.

Mr. Johnson: I don't intend to get into it in quite this way and perhaps I can ask a different question.

The Court: And what is the nature of it?

Mr. Johnson: The nature of this is this: In addition to having corporate offices in Carter Lake, Iowa, where the executive officers are of the corporation, that since this suit was filed, we contend the income derived by the corporation has been solely from the rent of these two cranes to Paxton and Vierling and I want to show the amounts, what times without referring to anything else.

The Court: I will let you ask that question.

Mr. Dinsmore: Okay.

(End of the conference at the bench.)

Q. (By Mr. Johnson) Mr. Peterson, in addition to (Page 176) having the corporate offices or principal place of business in Carter Lake, Iowa, is that where the executive officers, so to speak, of the corporation were in 1973 and have been since that time?

A. Yes.

(C. A. Appendix, Vol. II, pp. 136 and 137.)

On re-direct examination, counsel for respondent could have easily examined Mr. Peterson as to the principal place of business of petitioner as shown in the certificate of incorporation. However, that question was never asked.

Respondent cites the case of *Kibler v. Transcontinental and Western Air, Inc.*, 63 F. Supp. 724 (Eastern Dis. N. Y.), in support of its proposition that the principal place of business of a corporation is that which is designated in the charter or certificate. That case does not deal with diversity jurisdiction. It has absolutely no application to this appeal.

That case involved citizenship as it relates to *venue only* and not to diversity of citizenship for subject matter

jurisdiction purposes. The entire quote, of which respondent set forth only a part, reads as follows:

> "It has been held for the purposes of venue that the 'residence' of the usual corporation is the county in which the principal office or principal place of business is located. . . . In the case of a domestic corporation, its principal place of business is the location it so designates in its charter or certificate of incorporation. In the case of a foreign corporation, it is the location it so designates in its application for a certificate of authority to do business in the state as required by Section 210 of the General Corporation Law of the State of New York, Consol. Laws, c. 23."

However, it is obvious that even if it be assumed that the Certificate of Incorporation of petitioner is a valid portion of the record, it is not relevant as to petitioner's principal place of business. The statement of what the principal place of business of the corporation was in August of 1968 has no application to its principal place of business at the time the suit was filed five years later in 1973. Corporate headquarters and assets were all located in Carter Lake, Iowa and all corporate decisions and meetings occurred there. Even the president of petitioner, Ed Owen, testified in a deposition taken almost two years before the trial, that the principal place of business of petitioner was Carter Lake, Iowa. This has never been subject to dispute.

Generally, there are two basic tests used in determining the principal place of business of a corporation. One is the "nerve center" theory which would place emphasis on the location of the headquarters of the company. The other is the "operating assets" or "center of corporate activity" theory which would favor the state

where the corporation had the greatest contact with the public, i. e., had the largest number of employees, the greatest amount of assets, and derived the most income. *Bullock v. Wiebe Construction Company; Mahoney v. Northwestern Bell Telephone Company,* 258 F. Supp. 500 (D. Neb. 1966). It is obvious from the fact that there are two different tests that the courts are not in agreement as to which test should be applied in determining where a corporation's principal place of business is located. For various reasons, this split of authority has little bearing on the case at hand.

First, in *Mahoney v. Northwestern Bell,* the court found:

"It is the opinion of this Court, however, that the split of authority is largely linguistic. Even the cases which have taken the 'operating assets' approach have not ignored the location of the executive offices and of management activity. *Gilardi v. Atchison, Topeka and Santa Fe Railway Company,* 189 F. Supp. 82 (N. D. Ill. 1960); *Huggins v. Winn-Dixie Greenville, Inc.,* 233 F. Supp. 667 (E. D. S. C. 1964); *Kelley v. United States Steel Corporation,* 284 F. 2d 850 (3rd Circuit 1960). Conversely, those cases which recognize the 'nerve center' test have not done so without considering the location of the company's operations. In fact, all of the cases which have come to the attention of this Court agree that determination must be based on the facts of each individual case. The 'nerve center' approach would create a fictional principal place of business where a company's executive offices are located in one state and all of its business is transacted in another. *Bullock v. Wiebe Construction,* 241 F. Supp. 961 (S. D. Iowa 1965). In the same respect, the 'operating assets' test would not be adequate where a company's business is disbursed relatively equally among several states. In such a

case, the location of the executive offices assumes a greater importance. *Anderson v. Southern Bell Telephone and Telegraph Co.,* 209 F. Supp. 921 (M. D. Ga. 1962), *Egan v. American Airlines, Inc.,* 324 F. 2d 565 (2nd Circuit 1963), *Scot Typewriter Company v. Underwood Corporation,* 170 F. Supp. 862 (S. D. N. Y. 1959), *Textron Electronics, Inc. v. Unholtz-Dickie Corporation,* 193 F. Supp. 456 (D. Conn. 1961)."

That court was of the opinion that neither test is sufficient by itself to determine the principal place of business for purposes of § 1332 (c). The various factors used in determining the principal place of business are given greater or lesser weight according to the particular fact circumstances.

In the instant case, at the time this action was commenced, corporate headquarters of petitioner were located in Carter Lake, Iowa. Furthermore, all major policy decisions of the corporation were made at its corporate headquarters in Carter Lake, Iowa. These factors embrace a "nerve center" theory. In *Mahoney v. Northwestern Bell Telephone Company, supra,* the court clearly relied upon the "nerve center" theory in determining Northwestern Bell's principal place of business. In that case, the plaintiff alleged that she was a citizen of the State of Nebraska and that the defendant, Northwestern Bell Telephone Company, was a citizen of Iowa, thereby creating diversity of citizenship within the meaning of 28 U. S. C. § 1332, Paragraph (c). Northwestern Bell, however, was engaged in supplying communication services in the states of Iowa, Nebraska, South Dakota, North Dakota, and Minnesota. Its assets were variously distributed among those five states, with Minnesota and Iowa

containing the greatest share of the assets relative to the other states. The corporation's income, which was derived from these assets, was also variously distributed among the states, again with Iowa and Minnesota having the greatest share of profits relative to the other states. Similar proportions existed among the five states as to the number of telephone service units, telephone operators, and total employees. Of all the states, Minnesota clearly had the greatest proportion of any of the above items.

The court refused to designate Iowa as the principal place of business for the corporation on the basis of these factors. The court noted that although the day to day business of the company was handled by the regional offices in each state, the Omaha, Nebraska, office directed the methods, procedures, and standards of operation which provided the regional offices with rules for the day to day operations of the business. All of the major policy decisions were made in Omaha and the offices of all of the officers were also located in Omaha. It was therefore held that the "nerve center" of the business was clearly Omaha, Nebraska.

> "Where no one state is clearly the center of corporate activity, or accounts for a majority of the company income, the headquarters logically assumes greater importance in the determination. This is especially true where the activities conducted by the company are necessarily uniform and extensive coordination of operations is imperative. These considerations indicate that Nebraska is the principal place of business of the defendant, Northwestern Bell Telephone Company. As such, diversity is lacking, and this court does not have jurisdiction over the action."

Applied to the instant case, the "nerve center" theory clearly indicates that Carter Lake, Iowa, is the principal place of business of petitioner. The corporate headquarters were located in Carter Lake, Iowa, all major decisions were made at the headquarters, and the offices of the corporate officers were also located in the headquarters at Carter Lake, Iowa. For purposes of 28 U. S. C. § 1332, Paragraph (c), petitioner is also a citizen of Iowa, creating a lack of diversity. Furthermore, the petitioner has no other place of business whatsoever, so there could be no other "nerve center". Not only is petitioner's principal place of business located in Carter Lake, Iowa, but also its only place of business is located in Carter Lake, Iowa.

Moving to the "operating assets" or "center of corporate activity" theory of determining the location of the principal place of business, the principal assets from which petitioner derived the majority of its income were located in Carter Lake, Iowa, at the time this suit was commenced. These assets consisted of two cranes titled and licensed in the State of Iowa and leased to Paxton-Vierling Steel Co. on the premises in Carter Lake, Iowa. All of the books and records of the corporation were kept at these offices. The petitioner was engaged in only one business activity: the leasing of cranes for use in Carter Lake, Iowa.

In *Bullock v. Wiebe Construction Company,* 241 F. Supp. 961 (S. D. Iowa, 1965), the plaintiff, an Iowa citizen, brought suit in Federal Court against nine defendants. The court raised the issue of jurisdiction of the subject matter over concern as to whether the principal

place of business of one of the defendants was in the State of Nebraska or in the State of Iowa. The relevant facts concerning this defendant are stated in the case as follows:

> "The sole business of said defendant is the leasing of lands and buildings, which it owns, to various retail companies and other business establishments in the Spencer Shopping Center, Spencer, Iowa. The executive offices are located at Ralston, Nebraska. The corporation has no resident manager located at the shopping center. All directors are citizens of the State of Nebraska, except one who is a citizen of Michigan. All of the officers are citizens of the State of Nebraska and the corporate meetings are held in Nebraska. . . . Essentially all of the management and administration of the corporation's business is performed at its office in Ralston, Nebraska."

Emphasizing the fact that the defendant was in the sole business of leasing land and buildings in Spencer, Iowa, also that the defendant corporation's income was earned by the corporate assets, i. e., the lands and buildings, located at Spencer, Iowa, and the fact that the majority of the corporation's context with the public occurred at Spencer, Iowa, the Court held that the principal place of business of said defendant was at Spencer, Iowa. The court stated its reasoning for not relying on the location of the management and administration of the corporation's business in determining its principal place of business as follows:

> "Corporate management and internal corporate activities, such as Board of Directors meetings, appeared to the Court to be entitled to less weighted consideration when the producing assets are completely confined, as in the present case, to one state

> and that one state is other than the state in which the corporate management and internal activities take place. On the other hand, if the court were concerned with a larger corporation with production assets or production activities in many states, then such factors as corporate management and the internal corporate activities could be of considerable more importance."

The Court then dismissed the case as to all defendants.

Applying the holding of that case to the case at hand, petitioner was in the sole business of leasing its principal assets, i. e., the cranes, which were located, licensed, and titled, in the State of Iowa, and such assets provided the defendant with its income. Considering these facts alone, there is no question of their similarity to the facts in the *Bullock* case which clearly puts petitioner's principal place of business in Carter Lake, Iowa, thereby destroying complete diversity.

Moreover, the respondent long ago *conceded* that the principal place of business of petitioner was Carter Lake, Iowa. The trial court, in its memorandum overruling the defendant's motion for dismissal for lack of subject matter jurisdiction, found:

> "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. Section 1332; that the defendant is incorporated in the State of Nebraska and has its principal place of business there. *It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa.* Hence, an independent basis of jurisdiction does not exist." (A. 55) (Emphasis added.)

Respondent never raised this as an issue before the Court of Appeals. In the case of *Nealy v. Martin K. Eby Construction Company,* 87 S. C. 1072 (1967), this court found:

> "In a short passage at the end of her brief to this court, petitioner suggested that she has a valid ground for new trial in the district court's exclusion of opinion testimony by her witnesses concerning whether respondent's scaffold platform was adequate for the job it was intended to perform. This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40 (1) (d) (2)."

In the "memorandum to counsel in cases granted review on January 9, 1978" directed to counsel involved in this matter by Michael Rodak, Jr., Clerk, this court indicated that the appendix was to be printed and ready for filing by February 23, 1978. This court also urged the parties to the action to agree as to the contents of the appendix. Under the fifth paragraph of that memorandum, if no agreement was reached, then counsel for petitioner was to designate the portions of the record to be printed by January 19, 1978 and counsel for the respondent was to have cross-designated by January 30, 1978. The rule specifically provides that "those dates must be kept."

On January 18, 1978, counsel for petitioner forwarded to counsel for respondent a designation of those portions of the records to be included in the appendix including pleadings and other portions of the record, including the affidavits of counsels for petitioner. Also included was a statement of the issues presented for review pursuant to Rule 36(2) of the Supreme Court Rule. Those issues are

identical to the issues which appear in the brief of petitioner on writ of certiorari. It is to be noted that no question was ever raised as to whether or not the court erred in finding that the principal place of business of petitioner was Carter Lake, Iowa. Nor was the Certificate of Incorporation, now attached to respondent's brief on appeal to this court, included in the designation of portions of records to be included in the appendix. If respondent had intended to include anything other than that which was designated by counsel for petitioner, she was to so indicate it by January 30, 1978. Petitioner received no such indication from counsel for respondent.

Moreover, in paragraph 3 of the Memorandum Re Printing, which accompanied the above referred to memorandum to counsel, the court emphasized "in no event shall any documents or items not in the certified record be reproduced in the appendix." The Certificate of Incorporation was never in the certified record. It should not have been reproduced on appeal.

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CONCLUSION

The burden of proving the principal place of business was upon the respondent. It was respondent who was attempting to invoke the jurisdiction of the federal court.

Petitioner, therefore, respectfully requests that since respondent failed to sustain that burden of proof, that this court find that the trial court did not have the power to

hear this matter and accordingly reverse the judgment of the Circuit Court and dismiss for lack of jurisdiction.

Respectfully submitted,

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